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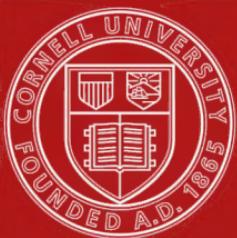
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A treatise on land titles in the United



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A TREATISE
ON
LAND TITLES
IN THE
UNITED STATES

Author of the Kentucky Treatise
By LEWIS N. DEMBITZ
OF THE LOUISVILLE BAR
Author of a Treatise on Kentucky Jurisprudence

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ALABAMA. Code of 1886.	MISSISSIPPI. Code of 1892.
ARIZONA. Revised Statutes of 1887.	MISSOURI. Revised Statutes of 1889.
ARKANSAS. Mansfield's Digest of 1884; Sandels & Hill's Digest of 1894.	MONTANA. Compiled Statutes of 1888.
CALIFORNIA. Civil Code; Code of Civil Procedure.	NEBRASKA. Consolidated Statutes of 1891.
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KENTUCKY. General Statutes of 1888; Statutes of 1894; Code of Civil Practice of 1877.	TENNESSEE. Code of 1884.
LOUISIANA. Revised Civil Code.	TEXAS. Revised Statutes of 1893; Paschal's Digest of Statutes (1875).
MAINE. Revised Statutes of 1883.	UTAH. Compiled Laws of 1888.
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MICHIGAN. Howell's Annotated Statutes, volumes 1, 2, and 3.	WASHINGTON. Hills' Statutes of 1891.
MINNESOTA. General Statutes of 1878 and 1888.	WEST VIRGINIA. Code of 1891.
	WISCONSIN. Revised Statutes of 1878 (Sanborn & Berriman's Ed., 1889).

LAND TITLES

IN THE

UNITED STATES.

CHAPTER IX.

TITLE BY MARRIAGE.

- § 104. Marital Rights at Common Law.
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§ 104. Marital Rights at Common Law.

At common law, marriage operated as a gift to the husband of all the personal property of the wife; and it invested him also with very important rights over her freehold lands and chattels real (i. e. leaseholds or estates for years.) He at once became seised in an estate for the joint lives of all these lands; seisin in right of his wife it was called, but it was for all practical purposes the same as if he had bought the land to hold it during the time of the joint lives,—that is, for as long as he and she should live. As we shall see hereafter, as soon as issue was born alive an estate for the residue of his own life, if he should survive his wife, was added to the estate for the joint lives; and thereafter he was the life tenant of all the lands, which might have come to his wife, either before or after marriage, either by purchase or by descent. He might, before issue born, sell or mortgage his estate for the joint lives, and, after issue born, the estate for his own life, by any of the known modes of conveyance. A fortiori he had the sole management, and could give leases of the lands so held, which would be good for as long as his estate for the joint lives or for his own life lasted. Lastly, his creditors might "extend" such estate as he had during the life of wife, under an

elegit, extent, or statute merchant, without any regard to the comfort of the wife, through whom the land had come.¹

When the wife's lands were sold, by fine in England, or joint deed upon privy examination in the United States, the proceeds of sale, unless they were settled on the wife as her separate estate, would, like other money or chattels belonging to her, become the property of the husband, and might be subjected to the payment of his debts.² Under the power which the husband has at common law of reducing the wife's choses in action into possession, he could always release any mortgage given to her, either before or after coverture, not indeed by reconveying the land, but simply by acknowledging receipt of the debt, and giving up the bond or note; for in equity the destruction of the debt would carry the mortgage along with it.³ As the wife could not convey her land without the husband's consent, nor make a will, his seisin in the right of the wife, and the estate in curtesy, which connected itself therewith (of which hereafter), were to him a secure interest, and in New York, at least, it was held that this interest was vested by marriage and the accrual of title in the wife, and could not be disturbed by acts conferring upon her the power to dispose of her inheritance by deed without the husband's consent.⁴ The chattels real of the wife, in like manner, fell to the husband, and during the joint lives he had enjoyment and control. They would revert to her on his death; but if he survived her he became entitled to them as administrator and sole distributee.⁵ One state in the Union (Georgia) favored the husband even

¹ 2 Kent, Comm. 130-134. The estate by entirieties described in chapter 3, § 27, had a very different aspect when marital rights were in full vigor from what it has now. An extreme instance of the marital power in the sale of such an estate during coverture under execution for the husband's debt is given in the comparatively late case (1857) of *Ames v. Norman*, 4 Sneed (Tenn.) 683, which follows *Jackson v. McConnell*, 19 Wend. 175.

² An extreme case is *Sheriff of Fayette v. Buckner*, 1 Litt. (Ky.) 127, where the lands owned by the wife and her infant coparceners were sold by a commissioner under a special act of assembly, and her share of the proceeds was held liable for her husband's debts, he being forced, in taking the insolvent oath, to give up this share to the sheriff.

³ *Marshall v. Lewis*, 4 Litt. (Ky.) 140; *McCrory v. Foster*, 1 Iowa, 280.

⁴ *Westervelt v. Gregg*, 12 N. Y. 202.

⁵ *Meriwether v. Booker*, 5 Litt. (Ky.) 254; *Allen v. Hooper*, 50 Me. 374; *Bates v. Dandy*, 2 Atk. 207; *Penn v. Young*, 10 Bush (Ky.) 626.

more than the common law. Here the husband was the sole heir of the wife's freehold lands as well as of her leaseholds; and thus by marriage became practically the owner of her land in fee, but his estate would be defeated by his dying before her.⁶

In 1844 the legislature of Maine took a radical step forward. In all couples who should marry after the 17th of April of that year, and as to any lands which should after that date be acquired by a woman then married, the husband was not to gain, nor the wife to lose, any estate or interest by the marriage; and this is still the law of that state, as will be shown in a section on "Statutory Separate Estate."⁷ Other states followed, but at first with more cautious tread. Thus, in 1845, Florida took away in great part the husband's freehold in the wife's lands, and in February, 1846, Kentucky secured the wife at least against creditors and alienees of the husband, enacting a law, that "marriage shall give to the husband during the life of his wife no estate or interest in her real estate, including chattels real * * * except the use thereof, with power to rent the real estate for not more than three years at a time, and receive the rent," etc. "Such real estate or rent shall not be liable for any debt or responsibility of his, * * * but," etc. "The husband's contingent right of courtesy * * * or the right to such use or rent shall not be subjected to his debt during her life."⁸ Similar statutes, ranging between these extremes, followed in rapid succession in the more conservative states; while those more radical in their policy, such as New York and Wisconsin, struck out, from 1848 and 1850 on, upon a plan of "woman's emancipation," by not only depriving the husband of his marital rights and power of disposition, but by also conferring upon the wife alone the capacity to sell and convey, incumber, contract to sell, or charge by debts her property, real or personal, as much as an unmarried woman, or, as some of the statutes put it, "as much as the husband can." In Georgia, where the husband's power had been broader than at common

⁶ Prescott v. Jones, 29 Ga. 58; Cain v. Furlow, 47 Ga. 674; Shipp v. Wingfield, 46 Ga. 593; Horne v. Howell, Id. 9; Hooper v. Howell, 52 Ga. 323.

⁷ See section 105 of this chapter.

⁸ Thus transcribed in Rev. St. 1852, c. 47, art. 2, §§ 1, 2. It remained substantially in force till June 12, 1894, when a sweeping "married woman's act", on the new pattern took its place.

law, a complete revulsion came in 1866, in the first course of reconstruction, and in most of the lately seceding states, when they adopted the new constitutions in 1868 and 1869.

It was one of the incidents of the common-law view of marriage that husband and wife could not convey to each other. She could not convey to him, as he would have to be a grantor with her, and no one can be grantor and grantee at the same time, and for the further reason that as she was in the husband's power, it was thought unjust to let him profit by her bounty; and he could not convey to her, on the technical ground of the so-called unity of the two.⁹ But means were soon found to evade the rigor of the law. The husband might convey his land to a stranger, who might then convey to the wife, both deeds being generally made on the same day, and each referring to the other; the grantee in the first and grantor in the second being known as the "conduit"; and similarly the land of the wife might, by the joint deed of husband and wife, be conveyed to a conduit, who would immediately thereupon convey to the husband. The latter transaction might be suspicious, and might be set aside by a court of equity on slight grounds, but upon its face it was valid.¹⁰ In equity, however, a single deed would suffice, from the husband, for his lands, to a trustee for the benefit of the wife; and a deed by husband and wife might pass her land to a trustee for the benefit of the husband. Nay, in the former case a mere declaration of trust by the husband in favor of his wife would have been enforced by a court of equity in her favor against heirs and devisees, or even against subsequent creditors.¹¹ At the present date, in most, if not in all, the states a simple deed of conveyance from the husband to the wife would carry not only an equitable, but even the legal, title.¹² The same

⁹ Beard v. Beard, 3 Atk. 72; Stone v. Gazzan, 46 Ala. 269; Pillow v. Wade, 31 Ark. 678; Allen v. Hooper, 50 Me. 371; Burdeno v. Amperse, 14 Mich. 91.

¹⁰ McCampbell v. McCampbell, 2 Lea (Tenn.) 661; Moore v. Page, 111 U. S. 117, 4 Sup. Ct. 388; Wormley v. Wormley, 98 Ill. 544.

¹¹ Barron v. Barron, 24 Vt. 375; Tennison v. Tennison, 46 Mo. 77.

¹² Shepard v. Shepard, 7 Johns. Ch. 57; Arundell v. Plapp, 10 Ves. 146; Hunt v. Johnson, 44 N. Y. 27; Dale v. Lincoln, 62 Ill. 22; Sims v. Rickets, 35 Ind. 181; Smith v. Dean, 15 Neb. 432, 19 N. W. 642; Jordan v. White, 38 Mich. 253; Putnam v. Bicknell, 18 Wis. 351; Carpenter v. Tatro, 36 Wis. 297; McCampbell v. McCampbell, 2 Lea (Tenn.) 661; Sayers v. Wall, 26 Grat. (Va.) 354; Washburn v. Gardner, 76 Ala. 597; Craig v. Chandler, 6 Colo. 543; Wal-

cannot be said so broadly of a deed from the wife to the husband, because in many of the states in which the disabilities of married women are otherwise removed a wife is still disabled from entering into a contract with, or making a conveyance to, her husband.¹³

We shall show hereafter how a decree of divorce works destructively upon courtesy and dower. We must notice here the statutes of three states—North Carolina, Arkansas, and Kentucky—which go further; for in these states the effect of a decree a vinculo is to restore to each spouse, not only all property rights arising by marriage, but all property not then disposed of which either of them has received from the other by reason or in consideration of marriage. Thus, if the husband gives to his wife or proposed wife, either after or before marriage, either as an inducement or gratification, or as a mere gift from conjugal affection, a tract of land, or any estate therein, without any equivalent in money or like thing of value, such land or estate therein returns to him whenever a divorce is obtained, no matter whether it is granted at his or at her instance, though in the latter case the court might indemnify the wife by an allowance of alimony.¹⁴

§ 105. Separate Estate in Equity.

The harshness of the common law, which gave to the husband a freehold in the wife's land, even during her own life, disposable at his pleasure, and subject to be sequestered for his debts, and still

lingford v. Allen, 10 Pet. 583; *Jones v. Clifton*, 101 U. S. 225. As to what is a valuable consideration for such deeds, see *Kaufman v. Whitney*, 50 Miss. 103; *Rowland v. Plummer*, 50 Ala. 182; *Chadbourne v. Gilman*, 64 N. H. 353, 10 Atl. 701. Mr. Justice Field says (*Jones v. Clifton*, 101 U. S. 228): "The technical reasons of the common law arising from the unity of husband and wife which would prevent a direct conveyance * * * from him to her for a valuable consideration * * * have long since ceased to operate in the case of a voluntary settlement."

¹³ Compare section 106 of this chapter. Thus, in *Gaston v. Weir*, 84 Ala. 193, 4 South. 258, the feme's deed was held unavailing in ejectment, though upheld as a contract in equity. *Powe v. McLeod*, 76 Ala. 418; *Breit v. Yeaton*, 101 Ill. 242; *Kinnaman v. Pyle*, 44 Ind. 275.

¹⁴ Kentucky, Civ. Code Prac. § 425 and St. 1894, § 2121, which is broader than the former law; North Carolina, Code, §§ 1843–1845, the first as to divorce,

greater severity of the law as to chattels and effects, gave rise to the doctrine of courts of equity known as that of a "married woman's separate estate." The owner of land and goods, whose daughter married a comparatively poor or perhaps a reckless and dissipated man, would be often unwilling to let his wealth go where those of his own blood might draw but little enjoyment from it. He could easily convey or devise it to a trustee, with instructions to pay the rents and profits only into his daughter's own hands, or to apply them in his own discretion, to her benefit. He might, by limitations taking effect after her death, exclude the husband from courtesy, administration, or distributive share. He could, at any rate, secure the lands against an *elegit* or *levari facias* for the husband's debts, and the chattels against a *fieri facias*. A woman of full age could, before marriage, settle her own property upon a trustee, upon similar trusts, to protect it against the rapacity or thriftlessness of her husband, or simply as a resort to fall back upon if his estate should be lost by misfortune. Or, finally, the husband himself might settle a part of his property, while solvent, upon his wife, in order to withdraw it from the reach of creditors to whom he might contract debts thereafter.¹⁵ Thus the need for "separate estates," or "trusts for the separate use," arose, and thus they were originally "raised" or created. The trust imposed upon a third person holding the legal title, and the power and duty in him to deal for the married woman's benefit, were the two leading features. Soon a third was added. The trustee was in many of the devises, or deeds of settlement, for the separate use of married women, directed to act only

the next as to forfeiture by eloping wife, the third as to husband who expels or deserts his wife and lives in adultery. See *Cook v. Sexton*, 79 N. C. 305; *Warlick v. White*, 86 N. C. 139. For Arkansas see chapter 26, Acts 1891.

¹⁵ The best discussion of the estate for the "separate use of a married woman" is found in *Hulme v. Tenant*, 1 Brown, Ch. 16, 2 Dickens, 560, republished in 1 White & T. Lead. Cas. Eq. 481, and Hare & Wallace's English and American notes upon it. See, also, Story, Eq. Jur. §§ 1378-1380, 1388-1397. 1 Sugd. Powers, pp. 181, 185, 202-206. The creation of a separate use for a woman not then married or contemplating a speedy marriage is of later origin; held inadmissible in *Massey v. Parker*, 2 Mylne & K. 174, but was allowed in *Tullett v. Armstrong*, 4 Mylne & C. 377, and is still disallowed in Pennsylvania. *McBride v. Smyth*, 54 Pa. St. 245; *Wells v. McCall*, 64 Pa. St. 207; *In re Quin's Estate*, 144 Pa. St. 444, 22 Atl. 965. See Lewin, Trusts, § 758.

upon the written request of the feme; and the trust thus became, from an active, a mere passive or naked trust. The next step which naturally followed was to confer powers on the feme herself, though at first in a disguised manner, e. g. that the trustee should, after the feme's death, hold the land or fund for the benefit of such person or persons as she, by her writing in the nature of a last testament, might name or appoint. But the English court of chancery at last brushed away the theory of trusts and powers, on which the separate use had been built up, and put in its place the doctrine that, as to her separate estate, a married woman is, in a court of equity, regarded as a feme sole, unless there is something in the deed or will or declaration of trust restricting her powers.

The separate estate in equity lost much of its importance by the laws enacted in the forties and fifties, by which the right of the husband's creditors to sell his freehold in right of his wife, during the joint lives, was taken away, and his own powers over it were greatly abridged; but at present it has become almost obsolete, as nearly every state has by statute turned all, or nearly all, the property of married women into "separate property," or "separate estate and property," with most of the beneficial features of the former estate known by that name, except those states in which the community régime between husband and wife governs, as will be shown hereafter. However, many titles still depend upon separate estates in equity, or estates supposed to be such, heretofore created.¹⁶

Merely putting the title to lands which are to belong beneficially to a married woman in the name of a trustee, in trust for her, does not make her estate "separate"; for a husband has, unless there are words to exclude him, his marital rights as well in his wife's equities as in her legal freehold.¹⁷ But it is a well-known maxim of equity

¹⁶ Some of these statutes have, however, been construed in the light of the law arising on the equitable estate. Thus, it was held in *Emmert v. Hays*, 89 Ill. 11, that, as under the rules in equity the wife could devise separate estate, the statute turning her "general" into "separate" estate must be construed as giving her the power to devise her lands generally. In Alabama, as will be seen hereafter, the equitable and the statutory separate estate go side by side, the former giving the feme wider power than the latter. So also in Missouri. *Richardson v. De Giverville*, 107 Mo. 422, 17 S. W. 974, and cases there quoted.

¹⁷ *Thomas v. Folwell*, 2 Whart. (Pa.) 11; *Schafroth v. Ambs*, 46 Mo. 114; (794)

that no trust shall fail for want of a trustee. Hence deeds or devises may be made directly to a married woman, or to an unmarried woman, in contemplation of any future marriage, in which the marital rights of the husband are excluded, and in such a case equity supplies the trustee; that is, the husband will hold his marital rights in trust for the feme's separate use, which means that he will not be allowed to exercise them to her prejudice, or against her wishes.¹⁸ Now, in deeds or devises made direct to the feme, a doubt often arises whether the words used are apt and efficient to raise a separate use. The most usual and approved form of words is: "For her sole and separate use, free from the debts and control of her husband, or of any husband she may have." Words much less explicit than these are often found, and give rise to dispute. No particular form of words is necessary, but the intent to exclude the husband's rights must be clear and unequivocal. An exclusion of his creditors, by itself, is not enough, and does not exclude them; nor do clauses against alienation, or anticipation of income, by themselves, suffice.¹⁹ Such words as "sole and separate use," or "sole disposition," or "without comprehending their husbands," or "full and sole use," or "sole use and benefit," have been held sufficient,²⁰ though the phrase last given ought hardly to have any such effect,

Warren v. Costello, 109 Mo. 338, 19 S. W. 29; Scott v. Causey, 89 Ga. 749, 15 South. 650.

¹⁸ Wood v. Wood, 83 N. Y. 575. And an antenuptial contract between husband and wife is sufficient to give her a separate use in her lands acquired before or after marriage. Story, Eq. Jur. § 1382; Richardson v. De Giverville, supra.

¹⁹ Gillespie v. Burleson, 28 Ala. 551. Stoogdon v. Lee [1891] 1 Q. B. 661. Clear words of exclusion required. Hart v. Leete, 104 Mo. 315, 15 S. W. 976. No special set of words. Boal v. Morgner, 46 Mo. 48. For the approved words, see Hays v. Leonard, 155 Pa. St. 474, 26 Atl. 664.

²⁰ Miller v. Voss, 62 Ala. 122. Habendum "to the sale and proper use, benefit, and behoof of said" feme held to create a separate use; relying on the earlier Alabama cases, collected in Continental Ins. Co. v. Webb, 54 Ala. 688, 701. Habendum "to her sole aid and behoof" deemed enough. Gray v. Robb, 4 Heisk. (Tenn.) 74. See words insufficient even in Alabama. Connor v. Williams, 57 Ala. 131. Direct to wife, "to her sole use and benefit," sufficient. Turner v. Shaw, 96 Mo. 22, 8 S. W. 897. "In her own right" was deemed sufficient in Rasberry v. Harville, 16 Ga. 530, 16 S. E. 299. Separate use of income makes separate estate. Vick v. Gower, 92 Tenn. 391, 21 S. W. 677.

when used in a deed of land, as it, or something very much like it, is often inserted, in printed blanks, at the end of the habendum clause, as a form which has long since become quite meaningless. On the other hand, such turns of speech as "to her use," or "to her own use and benefit," "to her absolute use," "to her own proper use and benefit," and "to be under her sole control," have been held insufficient; but it is admitted that the decisions are by no means in harmony.²¹ Slighter indications have always been held sufficient in deeds from the husband to the wife, direct or indirect, than where a conveyance or devise is made by a stranger, as the intent of the grantor to divest himself of marital rights, and to enlarge the powers of the donee, is naturally presumed.²² American courts have differed very broadly in adopting one or the other of the two grounds on which the doctrine of the separate use is based,—whether on that of a power conferred on the married woman, or on the right of a court of equity to look upon a married woman as unmarried whenever her dealings bear on the separate estate. The doctrine of "power conferred" is strictly adhered to in Pennsylvania, and was also prevalent in Rhode Island, North Carolina, and South Carolina, and to some extent in Tennessee.

²¹ Lippincott v. Mitchell, 94 U. S. 767, from Alabama; on the same words as those in case of Miller v. Voss, *supra*, these words held to have no effect. The court says: "Doubts are resolved in favor of the marital rights," quoting from *Bish. Mar. Wom.* § 824. And showing also that these words have been given in form books for ordinary deeds. *Oliv. Conv.* pp. 279, 290; *Lil. Conv.* (published in 1719). 4 *Byth. Prec.* 130, gives such words in a deed of feoffment. *S. p., Johnston v. Ferguson*, 2 *Metc. (Ky.)* 503; *Gaines v. Poor*, 3 *Metc. (Ky.)* 503. And see cases there quoted from *Story, Eq. Jur.* § 1383, of words insufficient for a separate estate. Where the husband conveys to a "conduit" in trust for the separate use of his wife, and to convey to her, the deed to her is rightly made "generally," so as to give her a legal fee; *Warden v. Lyons*, 118 *Pa. St.* 396, 12 *Atl.* 408. Contra, *Moore v. Jones*, 13 *Ala.* 296; *Fitch v. Ayer*, 2 *Conn.* 143; *Merrill v. Bullock*, 105 *Mass.* 486; *Turton v. Turton*, 6 *Md.* 375; *Wood v. Polk*, 12 *Heisk. (Tenn.)* 220.

²² *Deming v. Williams*, 26 *Conn.* 226; *Huber v. Huber*, 10 *Ohio*, 371; *Steel v. Steel*, 1 *Irl. Eq.* 452; *McWilliams v. Ramsay*, 23 *Ala.* 813; *Turner v. Shaw*, 96 *Mo.* 22, 8 *S. W.* 897; 1 *Bish. Mar. Wom.* § 832. *Harris v. Harbeson*, 9 *Bush (Ky.)* 402, which is to the contrary, is simply bad law, and is so considered by the Kentucky bar. The case is not as strong in a deed or contract as it would be of personality, when that had to be either separate estate or become the husband's property outright.

The practical difference between the two views is this: Where the capacity of the married woman was regarded only as the exercise of a power, her bond, note, or contract could not be enforced against the separate estate (certainly not against an estate in land) unless the instrument contained, not merely words excluding the marital rights of the husband, stamping the estate as "separate," but also express words allowing the feme to charge her interest with her debts, and then only when the intent to bind the separate estate, on her part, was evident; nor could she convey her interest, unless a power to that effect could be found in the instrument, express or implied. As a strong reason for this view, it was urged that the prime object of creating a separate estate (especially with a father who gives or devises property to a daughter) is to protect her against a reckless husband, and that this object can be attained much better by restraining the alienation of the estate than by rendering it more easy; for a wife is more readily induced to sign a note for the husband, or an informal order on her trustee, than to sign and acknowledge a formal deed on privy examination, as she would have to do if the land to be sold or charged had been given her as her "general" estate.²³ At least, it is so with a separate estate in land,

²³ If the capacity of a married woman to deal with separate estate rests on a "power," this power differs from all others, in that it is wielded by the donee, not over estates belonging to others, but upon her own interest. In the leading case of *Hulme v. Tenant*, Lord Thurlow holds it to be fully established "that a feme covert is competent to act as a feme sole with respect to her separate property, where settled to her separate use." Lord Cottenham in *Owens v. Dickenson*, Craig & P. 53, thought that the act of a married woman in charging her separate estate with her contracts cannot be an execution of a power,—that, in fact, there is no "power"; but what the transaction is he cannot define. The court of appeals of South Carolina in *Ewing v. Smith*, 3 Desaus. Eq. 417, took this ground; and was followed in that state in *Robinson v. Dart*, Dudl. Eq. 128; again in *Clark v. Makenna*, Cheves, Eq. 163 (i. e. in the absence of express power, the feme can neither with nor without husband and trustee charge or dispose of the separate estate); so, also, *Reid v. Lamar*, 1 Strob. Eq. 27 (where the creating words were "to be at her full disposal"; the estate was held not chargeable by her and her husband's joint note). It must also appear that credit was given to the estate. *Magwood v. Johnson*, 1 Hill, Eq. 228. Chancellor Kent, in New York, took the same ground, *Methodist Episcopal Church v. Jaques*, 3 Johns. Ch. 78; but was reversed (the supreme court judges declaring that the woman must, as to such estates, be treated as a feme sole), *Jaques v. Methodist Episcopal Church*, 17

with which alone we here deal. This is always raised by an express trust, which, under the statute of frauds, must be in writing,—either by deed in trust for the feme's separate use, or a written declaration by the owner that he thenceforth holds the land in trust for such use, or by last will containing a devise in apt words.²⁴

While the object in creating separate estates was, from the first, and in many cases to the very last, the exclusion of marital rights, and, as long as these rights were subject to execution, to secure the feme against the husband's creditors; it was often desired to confer upon her the power to make leases, to receive and receipt for the rents, to sell and, by a writing under her hand, to give to the purchaser an equitable estate, to pledge the estate for loans; to charge it with such debts as she may contract in writing, and, lastly, to devise the beneficial interest which she has, if it be a fee. As the estate (in land) is always created in writing, one or more of these powers is often expressly given, and, where the English view prevails, the expression of some of these powers does not exclude the others, which are implied. But the deed may expressly withhold from the feme such of the powers as would otherwise be implied, and there is no question that such exclusion would be sustained.²⁵

In Alabama the married woman was considered as a feme sole, as to her separate estate. She might bind it by contract without any powers being given to that effect, and the introduction of some specific powers in the deed or will were not considered as excluding others.²⁶

Johns. 548, which was followed in *Dyett v. North American Coal Co.*, 20 Wend. 570; and the feme's power of alienation has been spoken of as general, *Powell v. Murray*, 2 Edw. Ch. 636; *Albany Fire Ins. Co. v. Bay*, 4 N. Y. 9. Yet in all the New York cases it was held that a debt must be contracted for the benefit of the estate, or of the wife herself, and upon its and her credit, in order to charge it. The clauses against alienation or anticipation invented by Lord Thurlow are said in *Turner v. Shaw*, 96 Mo. 22, 8 S. W. 897, to imply the capacity to alienate in their absence. In *re Quin's Estate*, 144 Pa. St. 444, 22 Atl. 965, asserts the Pennsylvania view, first laid down in *Lancaster v. Dolan*, 1 Rawle, 236, and declared in *Maurer's Appeal*, 86 Pa. St. 380, too firm to be shaken.

²⁴ *Hulme v. Tenant*, 1 White & T. Lead. Cas. Eq. 481 (4th Am. Ed. 679), where the English cases are collected. *Pickard v. Hine*, L. R. 5 Ch. App. 274.

²⁵ *Pearson v. Pearson*, 60 N. H. 497; *Walter v. Walter*, 48 Mo. 140; *Reagan v. Holliman*, 34 Tex. 403.

²⁶ *Hooks v. Brown*, 62 Ala. 258.

In Tennessee, on the contrary, the opposite view was for a time carried so far that, in the absence of a power of sale and incumbrance, the married woman could not even convey by joining with her husband in an ordinary deed; but this line of decisions was overruled, and it was held that, in the absence of restrictions, a separate estate might be passed by such deed as would carry the woman's general estate.²⁷

The legislation on separate estates in Kentucky (where a married woman, even under the liberal married women's act of 1894, cannot convey her land without the husband's joinder in the deed) is noteworthy and unique. It began with the Revised Statutes of 1852, which, as to separate estates created thereafter, forbade alienation by the woman, with or without the consent of the husband, but allowed it upon the consent of the donor, or his personal representative, but, as to those created before the act, only by order of a court of equity, and for the purpose of reinvestment. By amendments of 1856 and 1858, this clause of the revision was declared not to forbid an alienation by trustees under express powers; and it is not to apply when powers of sale or exchange are expressly given. Aside of these amendments, the harsh rule was much softened by a decision that the husband settling land upon the wife is himself the donor, and can, as such, give his consent.²⁸ But the General Statutes of 1873 changed this law radically, directing that "separate estates and trust estates" devised to married women may be sold and conveyed in such manner as if such estates had been conveyed absolutely, if there be nothing in the deed or will to forbid it, "and if the trustee (if there be one) and husband unite with the wife in the conveyance; but her interest shall be the same in the proceeds as it was in the estate." The deed or will may hamper the alienation, but the law does not recognize any power which it might give to facilitate it by dispensing with the husband's consent, or with that of the trustee, though the trust be "naked." And the statute ap-

²⁷ Gray v. Robb, 4 Heisk. 74; contra, Parker v. Parker, 4 Lea, 392.

²⁸ Rev. St. Ky. c. 47, art. 4. § 17. O'Bannon v. Musselman, 2 Duv. 523, holds that express powers to the trustee were never affected; s. p., Lewis v. Harris, 4 Metc. (Ky.) 356; Dent v. Breckinridge, 1 Duv. 245 (husband donor). A separate estate raised by antenuptial contract was not within the law. See, however, Hanly v. Downing, 4 Metc. (Ky.) 97.

plies to all trust estates, whether separate or general. But what is most trenchant is the direction about the proceeds. It is true, where cash or securities are given for the land, the purchaser need not follow the application of the purchase money; but where the sale is made in satisfaction of an antecedent debt, and still more where the wife's separate or trust estate is pledged for the husband's debt, the purchaser or mortgagee knows that the proceeds have been misapplied, and his deed does not protect him. Deeds and mortgages made since June 12, 1894, when the new married women's law went into effect, are probably not liable to this objection.²⁹

In Alabama it was held at one time that a statute which turned the property of the wife, in a certain sense, into a separate estate, but gave her no power of disposition, repealed the incidents of the old separate estate in equity, so that an estate conveyed or devised to a woman by apt words was no longer chargeable for her contracts in writing. But this doctrine has been overruled, and there are now, it seems, in Alabama, two degrees of separate estates.³⁰

§ 106. Statutory Separate Property.

We have already referred to the radical departure from the common law of marital rights made in Maine, and the more cautious steps with which Kentucky followed; and, under the head of "Deeds by Married Women," we have alluded to the statutes in New York and other states, which enabled married women to convey their lands, by declaring them "separate property." We have also, in the chapter on "Wills," shown how, in nearly all the states, married women can freely dispose of their estates by will. It remains to give some details of the present state of the law as declared in constitutions and statutes.

The Southern states were rather backward in disturbing the

²⁹ Gen. St. Ky. c. 52, art. 4, § 17; *Hirschman v. Brashears*, 79 Ky. 258 (on the principle of *Wormley v. Wormley*. 8 Wheat. 421, that a purchaser who helps to divert the purchase money is liable for its diversion); thought to be repealed by St. Ky. 1894, §§ 2128, 2129.

³⁰ *Miller v. Voss*, 62 Ala. 122, overruling *Bowen v. Blount*, 48 Ala. 670. The doctrine of the latter case, that the statutory separate estate is to occupy the whole ground, seems to us the sounder.

old-fashioned relations between husband and wife, till after the exhausting losses of the Civil War their society was built up afresh in 1866 and 1868. It was felt necessary to shake off the burden of debts. Very liberal homestead laws and laws protecting the property of wives against the husband's creditors were a pressing necessity; and the Gulf states granted, under this pressure, to women those rights which New England had conferred on them on grounds of speculative justice. But "separate property," in this sense, is unknown to those states in which these words are used by way of contrast to the "community property" of husband and wife, as defined by the French and Spanish law. We shall, in subsequent sections, deal with these property rights as prevailing in Texas, California, and other states of the Far West.

The constitution of Mississippi, as adopted in 1876, following that of "reconstruction days," takes the broadest ground by declaring that "married women are hereby fully emancipated from all disabilities on account of coverture," and forbidding all distinction between the rights of men and women as to the acquisition, ownership, enjoyment, or disposition of property.³¹

The constitution of Alabama stops short of this. All property belonging to a female at marriage, or coming to her afterwards by "gift, grant, inheritance, or devise," remains her "separate estate and property," and shall not be liable for the husband's debts, and may be devised by her. This does not exclude the husband's control, or his veto upon alienation.³²

By the constitution of North Carolina the property of any female

³¹ Mississippi, Const. 1890, § 94. The legislature may, however, pass laws to regulate the powers of the husband and wife over the homestead.

³² Alabama, Const. 1868, art. 14, § 6; Const. 1875, art. 10, § 6. The words as to the husband's creditors do not prevent the wife from selling her property, in order to pay them. *Hooks v. Brown*, 62 Ala. 258. The statute allows her to contract with the husband's written assent, but forbids her binding herself or her separate estate for the husband's debt. See Civ. Code, §§ 2346, 2349. The husband must join in the conveyance of such an estate. *Holt v. Agnew*, 67 Ala. 360. Before 1887 (Civil Code) the rents of the wife's estate were subject to the husband's disposition. *Darden v. Gerson*, 91 Ala. 323, 9 South. 278. A sort of trusteeship is recognized in the husband,—power of management, though not a right of property. *Id.*, referring to *Turner v. Kelly*, 70 Ala. 85.

in the state, acquired before or after marriage, remains her "sole and separate estate and property," not liable for the husband's debts. It may be devised, and, with the written consent of the husband, may be conveyed.³³

By the constitution of South Carolina the property of a woman, held at marriage or acquired thereafter, shall not be subject to the husband's debts, but may be devised or alienated by her as if she were unmarried.³⁴

The constitution of Georgia says: "All the property of the wife in her possession at the time of her marriage, and all property given to, inherited, or acquired by her, shall remain her separate property, and not be liable for the debts of the husband."³⁵

That of Arkansas directs that the property of any feme covert "in this state," acquired before or after marriage, shall, so long as she may choose, remain her "separate estate and property," may be devised or conveyed by her as if she were sole, and shall not be subject to the debts of the husband.³⁶

Under the Florida constitution of 1885, as under that of 1868, all the real or personal property of a wife, owned by her before marriage or acquired afterwards by gift, devise, descent, or purchase, is her separate property, and is not liable for the debts of her husband, without her consent in writing, given in the manner of executing a conveyance, except for a debt contracted for the purchase money, or for labor and materials in improving it, furnished with her consent.³⁷

Under the statute of Maine a married woman of any age may own in her own right real and personal estate acquired by descent, gift, or purchase, and may manage, convey, and devise it by will, without the joinder and assent of any husband; but there is a proviso (which will be also found in several other states): Unless the property be given to her, or paid for by her husband, or given to her by

³³ Article 10, § 6, in the article on "Homesteads and Exemptions." See Code, §§ 1839, 1840.

³⁴ South Carolina, Const. art. 14, § 8.

³⁵ Georgia, Const. art. 7, § 2.

³⁶ Arkansas, Const. 1875, art. 9, § 7; placed in the Digest as section 4621. See, also, sections 4624, 4625.

³⁷ Florida, Const. 1885, art. 11, § 1.

his relatives, otherwise than in the payment of debt. Such, including the proviso, is in substance the law of New Hampshire.³⁸

In Massachusetts the property belonging to the woman at marriage remains her separate property, and she may receive, hold, manage, and dispose of real and personal property as if sole, and make contracts, oral and written, sealed and unsealed, except with her husband.³⁹

By the law of Connecticut, applying to all marriages, on or after April 20, 1877, neither husband nor wife shall by marriage acquire any interest in the property of the other, except the share of the survivor as regulated by law (i. e. courtesy, dower, descendible share, etc.). The separate earnings of the wife are her sole property. She can make contracts with third persons, and convey her property, as if sole. Her property is liable for her debts, but in no case for those of her husband.⁴⁰

The Revision of Vermont, as enacted in 1880, is not so broad. It only exempts the married woman's property, its rents and profits, and the husband's estate during her life from levy for his separate debts; and not even on debts contracted for necessaries to the family, or materials and labor to improve the wife's estate. But an act of 1884 secures to the married woman all her property, except such as she may receive by gift from her husband, as sole and separate, and she may contract regarding it with all persons except her husband, but cannot convey it otherwise than by joint deed duly acknowledged.⁴¹

In Rhode Island all real estate, chattels real, and personal estate, which are the property of a married woman before marriage, or become her property after marriage, or which may be acquired by her industry shall be absolutely secured "to her sole and separate use";

³⁸ Maine, c. 61, § 1, compiled from act of March 22, 1844, and an act of 1852 giving to the wife the power of disposition; New Hampshire, c. 176, §§ 1, 2.

³⁹ Massachusetts, Pub. St. c. 147, § 1. A married woman is to be sued in contract, under law of 1874. *Kenworthy v. Sawyer*, 125 Mass. 28. On contracts made before then, suit charging the separate property had to be brought. *Chapman v. Miller*, 128 Mass. 269.

⁴⁰ Connecticut, Gen. St. § 2796.

⁴¹ Vermont, R. L. 1880, § 2324; Sess. Acts 1884, No. 140, § 2; construed as against creditors in *Niles v. Hall*, 64 Vt. 453, 25 Atl. 479.

that is, stand like equitable separate estate. Yet the husband's receipt for her rents is good.⁴²

In New York this subject is governed by the acts of 1848, 1849, 1860, and 1884. Under the first of these acts, the property of any female marrying after it, owned at the time of marriage, with its rents and profits, was not to be at the husband's disposal, nor liable for his debts, but remain her sole and separate property, as if she were single; and the property and profits of a female already married were also to be free from the husband's control, and liable only for his antecedent debts. The second part was held void as far as it affected persons then married and property then owned. The act of 1849 authorized any trustee for a married woman, on her application and the certificate of a supreme judge, to convey the property to her for her sole and separate use. The act of 1860 directs that the property which a married woman now (then) owns as her sole and separate property, which comes to her by descent, devise, gift, or grant, or which she acquires by trade or labor carried on on her separate account, and what property a woman married in the state owns at the time, and the rents, issues, and profits thereof, shall remain "sole and separate," and free from the control of her husband, and not liable for his debts, except those contracted by her for the support of herself and her children as his agent; and she may bargain, sell, and convey her property, and be bound by the usual covenants of title. An act of 1884 allows a married woman to contract with regard to her separate property.⁴³

In Maryland all property belonging to a woman at marriage, or which she may thereafter acquire by purchase, gift, grant, or devise is her separate property.⁴⁴

⁴² Rhode Island, c. 166, §§ 1-3; chapter 165 determines the cases in which a woman may act as a sole trader.

⁴³ The acts are printed in the Revised Statutes published in 1889 as a substitute for part 2, c. 8, art. 5. In New York a common-law suit looking to a judgment quod recuperet may be brought on the married woman's contract. *Hier v. Staples*, 51 N. Y. 136.

⁴⁴ Maryland, Pub. St. c. 45, § 1. In the District of Columbia the property rights of married women rest on 2 Rev. St. U. S. (Laws of District of Columbia) §§ 727, 728. Land given by the husband to the wife through a trustee, who reconveys, is not separate. *Williams v. Reed*, 19 D. C. 46.

In Virginia all real and personal estate belonging to any woman, marrying hereafter (i. e. after 1874), at marriage, or acquired hereafter in any way, is separate property, not subject to the control of the husband, nor liable for his debts, and may (unless she be a minor) be incumbered, conveyed, or devised by her sole act.⁴⁵

In West Virginia the property and pecuniary rights, and rents, issues, profits, and increase of married women heretofore (1878) acquired, remain their sole and separate estate, free from the control and debts of the husband; and they may take by inheritance, gift, grant or devise any property, rents, etc.; and may by acknowledgment make valid executory contracts regarding such property. An act of 1891 again gives these rights and powers to parties marrying thereafter, and, like the New York statute, provides for the turning over of trust estates to women capable of management.⁴⁶

By the Tennessee Code, the rents and profits of the property of a married woman, which she owns, or of which she becomes seised or possessed by purchase, devise, gift, or inheritance, as a separate estate for years, or for life, or as a fee-simple estate, is in no manner subject to the debts or contracts of her husband, except by her consent, obtained in writing, saving, however, his courtesy. The proceeds of sale can only be paid upon her written consent, given upon privy examination, or in accord with a conveyance thus executed by her.⁴⁷

In Missouri all property belonging to a woman at marriage, or coming to her during coverture by gift, bequest (sic), or inheritance, or purchased with separate means or the wages of her separate labor, or arising from violation of her personal rights, with its increase, rents, and profits, is separate property, under her sole control, not liable for the debts of the husband, except for necessaries to the family, or for work and material furnished in improving such property.⁴⁸

In Indiana the lands of a married woman and the profits therefrom

⁴⁵ Virginia, Code, §§ 2284-2286, based on chapter 359 of act of 1874.

⁴⁶ West Virginia, Code, c. 66, §§ 1-4. Land bought before 1868 in wife's name is not separate. It and its proceeds are subject to husband's debts. *Pickens' Ex'r's v. Kniseley*, 36 W. Va. 794, 15 S. E. 997.

⁴⁷ Tennessee, Code, § 3343.

⁴⁸ Missouri, Rev. St. § 6869.

are her separate property, and not liable for the debts of the husband; and she may take and hold property, real and personal, by conveyance, gift, devise, or descent, or by purchase with her separate means; and such property, with its rents, issues, profits, and increase, shall remain her own separate property, under her own control; but she cannot convey her land, except by joint deed.⁴⁹

In Illinois a married woman may, in her own right, own real and personal property, obtained by descent, gift, or purchase, and may manage, sell, and convey the same to the same extent and in like manner in which the husband can property belonging to him.⁵⁰

In Ohio the legislature, in 1887, borrowing from the Civil Code of California, ordained: "Neither husband nor wife has any interest in the property of the other" (except a right of support); "but neither can be excluded from the other's dwelling." They may enter into engagements with each other, only, however, like parties standing in confidential relations. A married person may take, hold, or dispose of property, real or personal, the same as if unmarried. "Property" is to be taken in its widest sense. The perfect equality with which husband and wife are spoken of is quite noteworthy.⁵¹

In Michigan any real or personal estate acquired by a female before her marriage, or thereafter by inheritance, gift, grant, or devise, and the rents, profits, or increase of the same, continues to be her separate property as before, and is not liable for her husband's debts, but is liable for all debts contracted by her before marriage; but she cannot give, grant, or sell property without the consent of her husband, except by an order of the probate judge.⁵²

In Wisconsin, the real estate (including that held in joint tenancy with the husband), and the rents, issues, and profits thereof, of any female then married (i. e. in 1850), are not subject to the husband's disposal, but are her sole and separate property, as if unmarried; so,

⁴⁹ Indiana, Rev. St. § 5117.

⁵⁰ Illinois, Rev. St. c. 68, § 9.

⁵¹ Ohio, Rev. St. §§ 3111-3117 (Act March 19, 1887).

⁵² Michigan, St. §§ 6288, 6295-6297. The married woman cannot bind herself generally, but only the separate property, by a contract affecting her or it. *West v. Laraway*, 28 Mich. 466; *Kenton Ins. Co. v. McClellan*, 43 Mich. 564, 6 N. W. 88; *Mutual Ben. Life Ins. Co. v. Wayne Co. Sav. Bank*, 68 Mich. 116, 35 N. W. 853; *Buck v. Haynes' Estate*, 75 Mich. 397, 42 N. W. 949; *Tompkins v. Hollister*, 60 Mich. 470, 27 N. W. 651.

as to the property owned by any female marrying thereafter, and the rents, issues, and profits thereof; and she may receive by inheritance, gift, grant, or devise, from any person other than her husband, any property, and hold it, with its rents, issues, and profits, as her sole and separate estate. And this section confers on married women the power to convey lands by either joint or separate deed.⁵³

In Iowa a married woman has, under the statute, exactly the same rights as stated above for Illinois. In both states, the statute leaves it to inference that all the property brought into the marriage, or acquired in the manner stated, does take the course, which by its words it may take.⁵⁴

In Minnesota all property and choses in action owned by a married woman, or owned or held by any woman at the time of her marriage, shall continue to be her separate property, and she may, during coverture, receive, take, hold, and enjoy property of any description, and the rents, issues, and profits thereof, and all avails of her contracts and industry, free from the control of her husband, and from any liability for his debts. She may contract, and her property is liable for her debts and torts; but she cannot make a conveyance, except a mortgage for the purchase money, or a lease for not over three years, except by joint deed with her husband.⁵⁵

In Nebraska the property which any woman in the state owns at marriage, and the rents, issues, profits, and proceeds thereof, or which shall come to her by descent, devise, or gift of any person other than her husband, shall remain her sole and separate property, and shall not be subject to the debts of her husband; but are upon a return of "No property" against the husband, liable on a judgment for necessaries. The woman may, while married, bargain, sell, and convey her property, or contract regarding it, in like manner as a man might.⁵⁶

⁵³ Wisconsin, St. 1850, §§ 2221, 2340-2343. When the supreme court was first called upon to enforce the act of 1850 (in *Norval v. Rice*, 2 Wis. 17), they thought it a very odd piece of legislation.

⁵⁴ Iowa, § 1935, etc.

⁵⁵ Minnesota, c. 69, § 1.

⁵⁶ Nebraska, §§ 1411, 1412, 1415 (a woman marrying outside of the state has also all the rights given her by the law of the place or by marriage contract).

In Kansas the property which "any woman in this state" may own at marriage, or acquire thereafter by descent or devise or as the gift of any person but her husband, remains her sole and separate property, is not subject to the husband's disposal, nor liable for his debts; and she may sell and convey it, and enter into contracts regarding it, just as a married man can as to his property.⁵⁷

In Oregon the property and pecuniary rights which a woman has at the time of her marriage, or acquires afterwards by gift, devise, or inheritance, or by her own labor, are not subject to the debts and contracts of her husband, and she may manage, sell, and convey it (as in Illinois).⁵⁸

In Colorado all property which a woman in the state may own at marriage, and the rents, issues, and profits thereof, and any property which may come to her by descent, devise, or by the gift of any person other than her husband (also presents from him, such as jewelry, silver, watches, etc.), remain her sole and separate property, and are not subject to disposal by the husband or to any of his debts.⁵⁹

The Dakota Code has borrowed, as the legislature of Ohio did afterwards, the provisions of the Civil Code of California regarding "separate property," without accepting those on the community property of husband and wife.⁶⁰

Wyoming, of course, gives to married women the fullest control of their property, acquired either before or after marriage, with the power to contract, sell, convey, and devise; yet what is acquired by her after marriage must come from a person other than her husband, in order to become her sole and separate property.⁶¹

⁵⁷ Kansas, pars. 3752, 3753, dating back to October 31, 1868.

⁵⁸ Oregon, §§ 2992, 2993, dating back to October 21, 1878.

⁵⁹ Colorado, § 2266.

⁶⁰ Dakota Territory, Civ. Code, c. 3, §§ 73, 82.

⁶¹ Wyoming Territory, St. §§ 1558-1661. For the Arizona statute giving the wife full control of her property, see Rev. St. § 2103, and Liebes v. Steffy (Ariz.) 32 Pac. 261. In New Mexico, under the present statutes, all property owned by a woman at marriage remains her separate property, and she may during coverture receive and hold property free from her husband's debts. She is bound by her contracts, and a general judgment can be taken and enforced by execution on her lands. She cannot convey or incumber her land unless the husband joins.

We return to the states of Pennsylvania, New Jersey, and Delaware, which have moved later than any others in this direction. In Pennsylvania "The Married Persons' Property Act," thus called in its own body, was passed June 3, 1887. "Hereafter" marriage shall not be held to impose any disability on a woman to contract in her own business, or for necessaries, or for the benefit of her separate property; but she cannot become surety for anybody (under which provision a judgment confessed by her to raise money for her husband is void). She may lease her land, but cannot convey or incumber it except by the joint deed of herself and husband, though her land may be sold under a judgment for debts contracted by her. She may acquire property of any kind, and whatever is acquired before or after marriage "shall belong to her, and not to her husband or his creditors." It is clear that disabilities are removed from women already married at the time of the passage of the act; but does the husband lose, by the act, the marital rights which he then held in the land then owned by the wife? Considering the great latitude given in Pennsylvania to retrospective legislation, we should think he does.⁶²

In New Jersey all property owned by a woman at marriage remains her sole and separate property; also what she receives during marriage by gift, grant, descent, or devise, and the rents, issues, and profits thereof, and it is free from the control of the husband, and not liable for his debts. She can, with his consent, convey her lands, and release future or contingent interests therein. Upon contracts arising before January 1, 1875, on which she could have been sued in equity as to her separate estate, she can now be sued at law, and upon her contracts made since; but she cannot become a surety, guarantor, accommodation indorser for any one, nor be made to answer for the debts or default of another. When living separate from her husband, or when he fails to support her, she may convey her lands by her sole deed.⁶³

In Delaware the subject is regulated by acts of April 9, 1873, of

⁶² Lawyers outside of Pennsylvania can find the act of 1887 in Hubbel's Law Directory for several years following its date, down to 1893. See its construction in *Real-Estate Investment Co. v. Roop*, 132 Pa. St. 503, 19 Atl. 278.

⁶³ New Jersey Revision, pp. 638, 639; Supp. Revision, p. 447; Acts of 1888, c. 205; Acts of 1889, c. 28; Acts of 1890, c. 27; Acts of 1891, c. 150.

March 17, 1875, of 1879, and of 1885. The property owned by any woman married since the first-named day, or acquired thereafter by any married woman, otherwise than by gift from her husband, is, with its issues and profits, her separate property not subject, etc.,—liable to her debts contracted before or after marriage; but she cannot convey or incumber her land, except by mortgage for the purchase money.⁶⁴

It will be noticed that many of the statutes except gifts given or paid for by the husband from their operation; but, in the absence of a clause to such effect, land conveyed by the husband, directly or indirectly, is as much under the control of the wife as any other.⁶⁵ Again where the statute does not limit its effect to such property purchased after marriage as is bought with the wife's own means, she can impress the separate character on lands or chattels bought upon her credit, and on which nothing has been paid.⁶⁶ Where the feme covert has the power to alien, the consideration of her deed can no more be inquired into than that of any other grantor. She may alien for future advances, or she may give away her separate property;⁶⁷ but in the absence of statutory permission in express words, though she can convey to others she cannot convey to her husband, and a direct deed of the separate property from her to him is void at law, and cannot be aided in equity.⁶⁸

In Maine the words of the enabling statute, "as if she was unmarried," have, however, been rightly construed to abolish all exceptions, and a direct deed from the wife to the husband, whether for a consideration or a mere gift, is good even at law.⁶⁹

⁶⁴ Delaware, Rev. Code, p. 479 (vol. 14, c. 550; vol. 15, p. 289; vol. 16, p. 188); Laws of 1885.

⁶⁵ Whiton v. Snyder, 88 N. Y. 299. The question whether the husband may manage land conveyed to him and his wife by entireties is not answered either here or in Bertles v. Nunan, 92 N. Y. 152, in both of which cases such estates are discussed.

⁶⁶ Holcomb v. People's Savings Bank, 92 Pa. St. 338.

⁶⁷ Goodale v. Patterson, 51 Mich. 532, 16 N. W. 890.

⁶⁸ White v. Wager, 25 N. Y. 328; Winans v. Peebles, 32 N. Y. 423. In New York, contracts between husband and wife are still excepted by the act of 1884 (section 2). In Indiana, the wife can bind herself generally since September 19, 1881. Vogel v. Leichner, 102 Ind. 55, 1 N. E. 554.

⁶⁹ Allen v. Hooper, 50 Me. 371; Savage v. Savage, 80 Me. 472, 15 Atl. 43. In the latter case the same tests of duress were applied as to a conveyance

In Iowa, where a deed of gift by the husband to the wife is good at law, mutual deeds by husband and wife to cut off their rights in each other's property have been held void.⁷⁰

Several of the states, among them Indiana and Alabama, have limited the general power of married women to contract, or to bind their "separate property" by their contracts, in one direction: They must not become sureties for any one; or, at least, the wife not become surety for her husband, either personally or by pledging or mortgaging her estate for his debt.⁷¹

§ 107. Dower as at Common Law.

No part of real property law is so peculiar to England and America as the widow's right of dower, i. e. her right of having, during her life, the enjoyment of lands and tenements wherein her husband was seised at any time during her coverture of an estate of inheritance. There must be a marriage; there must be a seisin; the husband must be dead,—to give rise to dower.⁷²

As to what is a sufficient marriage, Kent says, on the authority of Coke upon Littleton and of early New York decisions, that any marriage not absolutely void, though it may be voidable by decree, gives rise to dower, if it be not dissolved before the husband's death; that a marriage within the age of consent, though the husband died within that age, is sufficient; and this would still be good law, except where the statute declares such a marriage void.⁷³ The distinction

between strangers. In Kansas, such a deed is void unless made for a consideration. *Grindrod v. Wolf* (1888) 38 Kan. 292, 16 Pac. 691.

⁷⁰ *Craig v. Monitor Plow Works*, 76 Iowa, 577, 41 N. W. 364; *Shane v. McNeill*, 76 Iowa, 459, 41 N. W. 166.

⁷¹ *Haas v. Shaw*, 91 Ind. 386 (Rev. St. § 5119); Alabama, Civ. Code, § 2349, dating back to an act of February 28, 1889. This measure was in the old Roman law embodied in the *Senatus Consultum Macedonianum*. The Alabama law has been extended even to deeds by the wife of her statutory separate estate in payment of the husband's debt. See *Bibb v. Pope*, 43 Ala. 190; *Weil v. Pope*, 53 Ala. 585; *Prince v. Prince*, 67 Ala. 565. The joint deed will carry the husband's courtesy. *Chapman v. Abrahams*, 61 Ala. 108. Law does not apply as against express power. *Becton v. Selleck*, 48 Ala. 226.

⁷² The following sketch of the common-law principles of dower is drawn in the main from 4 Kent, Comm. 35-62. In the "common law" the English statutes preceding the settlement of the colonies are included.

⁷³ Co. Litt. 33a ("so as she be past the age of nine years"); and "of what

that a marriage may be good for other purposes, when resting only on cohabitation and reputation, but will not entitle the widow to dower; that for the latter purpose there must be a ceremony such as the law prescribes,—a marriage in fact, or in facie ecclesiæ,—has been urged on some occasions, but cannot be maintained.⁷⁴

In the old books it is said that the seisin of the husband must have been in "severalty," which simply means that he must not be a joint tenant, subject to right of survivorship in his fellows, but does not debar the widow of a coparcener or tenant in common of her dower.⁷⁵ The husband must have seisin in law (that is, not a mere remainder or reversion in fee after a freehold estate which does not fall in till after his death),⁷⁶ but it need not be a seisin in fact (that is, the

age soever the husband may be, albeit he were but four years old." Kelly v. Harrison, 2 Johns. Cas. 29. At present these child marriages are, we think, void both in England and America.

⁷⁴ In Fenton v. Reed, 4 Johns. 52; Hantz v. Sealy, 6 Bin. 405; Donnelly v. Donnelly, 8 B. Mon. (Ky.) 117,—the wife by "cohabitation and reputation" (married to a second husband in good faith after disappearance of the first, who died before the second) was endowed. But few of the states would now recognize such a relation as marriage for any purpose; Kentucky not since the Revised Statutes of 1852.

⁷⁵ Fitzh. Nat. Brev. 150k; Co. Litt. 31b. Contra, as to lands held in common, Co. Litt. 32b. And where a man buys land subject to dower, either from the husband without the wife's concurrence, or from the heirs without that of the dowress, so that he has to allot dower to his grantor's widow, his own widow is endowed of only two-ninths of the fee, and will not get the remaining one-ninth after the first widow's death, for her husband had only an outstanding reversion as to one-third; Coke puts the case of the son and heir dying while his mother holds her dower, which leads to the same result. Geer v. Hamblin (Sup. Ct. N. H. 1808), reported only in a note to 1 Greenl. (Me.) 54, decides only that the outstanding dower of the first widow is not a good plea to a writ of dower by the second; and quotes Hitchens v. Hitchens, 2 Vern. 403, for the position that, if the first widow does not claim, the second is dowable of her full thirds. See, also, Manning v. Laboree, 33 Me. 343. The precedence of the first seised husband's widow is declared in some states by statute; e. g. Michigan, § 5769. And as Coke, supra, remarks, the dower of a tenant in common cannot be assigned by metes and bounds, but she can only be declared a tenant in common for her share. Joint tenancy being so rare, the old decision in Kentucky (Davis v. Logan, 9 Dana, 186) and the statute in Missouri endowing the wife of a joint tenant are of very slight importance.

⁷⁶ See instance in preceding note; also, Brooks v. Everett, 13 Allen, 457. An outstanding chattel interest is immaterial, for the possession of a lessee

widow is dowable of wild lands or vacant lots, and of lands held by others adversely to her husband, as the lack of his taking actual possession is not her fault).⁷⁷ There is no dower in an estate pur autre vie, nor in a leasehold, no matter how long.⁷⁸ The widow has no dower where her husband has only an instantaneous seisin (e. g. in the ordinary case of a "conduit pipe," where land is conveyed to him by another married man with a view of his conveying it immediately to the latter's wife; ⁷⁹ or, as against the mortgagee, in the still more common case of the purchaser of land buying it with the understanding that he will at once execute to his vendor a mortgage for the unpaid part of the price); ⁸⁰ but when the husband has any benefit during his short seisin the widow is dowable.⁸¹

for years is the seisin of the landlord. In *Eldredge v. Forrestal*, 7 Mass. 253, the mother having a life estate under her husband's will, the wife of her son who died before her had no dower; s. p., *Dunham v. Osborn*, 1 Paige, 634. The case discussed by Kent in a note, where the estate is in the husband for life remainder to another or others for life or lives, remainder to the husband's heirs, seems to the writer to depend on the question whether the rule in *Shelley's Case* is in force. If it is, the husband has a fee, and his wife ought to be dowable. How the repeal of that rule defeats dower, see *Trumbull v. Trumbull*, 149 Mass. 200, 21 N. E. 366.

⁷⁷ Kent cites *Broom*, tit. "Dower," pl. 75; *Litt.* §§ 448, 661; *Co. Litt.* 31a. The position has never been doubted, except in this country with regard to wild lands, on account of the worthlessness of a life estate, where its enjoyment must involve the cutting of timber, and lay the life tenant open to forfeiture for waste. In Virginia, West Virginia, Kentucky, and Missouri there are statutes declaratory of this common-law rule dispensing with actual possession.

⁷⁸ *Gillis v. Brown*, 3 Cow. 388 (pur autre vie); *Whitmire v. Wright*, 22 S. C. 446 (long lease). As to long leases in certain states, see chapter on "Descent," § 28.

⁷⁹ *Co. Litt.* 31b; the conduit in the old cases is the conusee in a fine. We quote from more modern practice: *Edmonson v. Welsh*, 27 Ala. 578; *Bullard v. Bowers*, 10 N. H. 500; *Gammon v. Freeman*, 31 Me. 243, where an exchange of lands brought three parties together. So, in *Wooley v. Magie*, 26 Ill. 526, where one without title sold United States land with warranty, and thereafter took out a patent; widow not dowable.

⁸⁰ *Holbrook v. Finney*, 4 Mass. 566; *Clark v. Munroe*, 14 Mass. 351 (where the mortgage was given by arrangement to a third party who loaned the pur-

⁸¹ *Douglass v. Dickson*, 11 Rich. Law (S. C.) 417 (where the husband buying land from executors agreed to convey it back, but in doing so, reserved a water right to himself); *Tewis v. Steele*, 4 T. B. Mon. (Ky.) 339 (a very hard case).

The estate of inheritance of which the widow is dowable may be an absolute fee, or a fee defeasible, though it is defeated by the husband's death (as in the common case of a fee, with an executory devise over on his dying without issue living at his death), or a fee tail, though he die without heirs of the body; that is, the widow will hold her dower against the executory devise in the one case, or against the remainder-man or reversioner in the latter, though it is said on high authority that, when the fee is determined by a condition at common law, there is no dower.⁸²

chase money); *Bogie v. Rutledge*, 1 Bay (S. C.) 312; *Stow v. Tiff*, 15 Johns. 458; *McCauley v. Grimes*, 2 Gill & J. (Md.) 318; *Reed v. Morrison*, 12 Serg. & R. (Pa.) 18. In Kentucky, where an express vendor's lien is nearly always retained for the unpaid part of the price, it has, of course, precedence over the dower. In either case the widow is, however, dowable in the surplus. In many states the statute affirms this rule; e. g. New York, Rev. St. pt. 2, c. 1, tit. 3, § 5; Michigan, § 5736; Wisconsin, § 2163; Kentucky, Gen. St. c. 52, art. 4, § 4 (now section 2135); Illinois, c. 41, § 4. See such a statute applied, in *Thompson v. Lyman*, 28 Wis. 266; *Jones v. Parker*, 51 Wis. 218, 8 N. W. 124. The wife should be a party to the foreclosure proceedings (*Foster v. Hickox*, 38 Wis. 408), or will not be concluded. *Newton v. Sly*, 15 Mich. 391; *Burrall v. Bender*, 61 Mich. 608, 28 N. W. 731; *Brackett v. Baum*, 50 N. Y. 8, 10 (where the land was sold under a power). The closely following sections in the Michigan and Wisconsin revisions confining the widow to the surplus, not only against the mortgagee, but against the heir, are declaratory of common equity; by which the husband is seised of no more than he has paid for. See, also, *Bowles v. Hoard*, 71 Mich. 150, 39 N. W. 24. See Kentucky St. 1894, § 2135. But the supreme court of Georgia has decided to the contrary, claiming English precedents, as well as the particular frame of its statute for its divergent decision,—the former because it compares a mortgage in that state to the vendor's lien in England. *Clements v. Bostick*, 38 Ga. 1; *Slaughter v. Culpepper*, 44 Ga. 319. If, however, the personal estate of the mortgagor is sufficient to lift the debt, the dowress, as well as the heir, is relieved.

⁸² 4 Kent. Comm. 49, 50, considers the question as to defeasible fees open, and inclines rather to the position opposed to our text. He refers to *Sammes v. Payne*, 1 Leon. 167; *Flavill v. Ventrice*, 9 Vin. Abr. F, p. 217, pl. 1; *Sumner v. Partridge*, 2 Atk. 47; but mainly, and with grave doubt, to *Buckworth v. Thirkell* (3 Bos. & P. 652, in a note to *Doe v. Hutton*) from B. R. Trin. Term, Geo. III., decided by Lord Mansfield and the K. B. after two arguments, where the husband had courtesy in a fee defeated by the death of his wife without living issue. The case in 1 Leon. was of an expiring estate tail, also courtesy. In *Fry v. Scott* (Ky.) 11 S. W. 426, under a Kentucky statute declaring the common law of dower, that the widow has her thirds whenever the husband was seised in "fee simple," a widow was endowed though fee had been defeated by his dying without issue, on the ground that a fee defeasible is a kind of "fee sim-

As the husband had at common law to be "seised" during coverture, the widow was not dowable of land in which a reversion or remainder after a freehold estate (e. g. after an estate in a mother's dower) did not fall in before the husband's death; nor in land belonging to him in *præsenti*, but held adversely to him and not recovered in his lifetime. The latter position seems never to have been recognized in the United States, and in some states (as in Virginia) is expressly removed by the statute defining dower. The former position, that there must have been "seisin in law," is the general rule in this country.⁸³ But there are some few exceptions.⁸⁴

ple." In the earlier case of *Northcut v. Whipp*, 12 B. Mon. 65, it was put upon the ground stated by Littleton, that where a woman's issue might take by descent she must have dower; and the English case of *Moody v. King* (1825) 2 Bing. 447, is quoted in support. To the same effect is *Evans v. Evans*, 9 Pa. St. 190. No cases are cited by Kent against our position,—only the opinions of eminent writers (Butler, in notes to Co. Litt.; Sugden on Powers; Preston on Abstracts; Park on Dower); but English conveyancers always hated dower. As to estates tail see *Paine's Case*, 8 Coke, 34; *Smith's Appeal*, 23 Pa. St. 9 (applied to the statutory dower, which is greater than one-third when husband dies without issue). But, under the laws of Connecticut, Ohio, Illinois, Missouri, and four other states, an estate to A. B. and the heirs of his body gives to the first taker only an estate for life (see chapter 3, § 18). Hence his widow is not dowable. *Whiting v. Whiting*, 4 Conn. 179. But the decision is put on the ground that a grantee in fee from the first taker has a base fee. *Burriss v. Page*, 12 Mo. 358; s. p., *Medley v. Medley*, 27 Grat. (Va.) 568. Contra, in Ohio, *Myers v. Moore*, 12 Cin. L. B. 90. Littleton, in sec. 36, Co. Lit. 31a, does not name the first taker in tail special (i. e. him whose issue by a named wife only is to inherit) among those whose wives are dowable, and similarly as to courtesy; but he evidently means to exclude his widow only when there is no issue, for he recognizes the test that, wherever issue takes by descent, the widow is dowable. When a tenant in fee dies without heirs, and the land escheats to the lord, his widow is dowable. See 4 Kent. Comm. 49, and 1 Washb. Real Prop. p. 139, as to estates determined by conditions at common law, which are certainly very rare.

⁸³ *Wood v. Phillips*, 2 Ohio Cir. Ct. R. 136; *Houston v. Smith*, 88 N. C. 312, quoting 1 Scrib. Dower, 217; *Northcut v. Whipp*, 12 B. Mon. 65. In *Adams v. Beekman*, 1 Paige, 631, the remainder was contingent,—a stronger case against the dower. More direct is *Poor v. Horton*, 15 Barb. 485 (secus, where the husband buys in the life estate, *House v. Jackson*, 50 N. Y. 161; *Powers v. Jackson*, 57 N. Y. 654); *Shoemaker v. Walker*, 2 Serg. & R. 554, supported by *Moody v. King*, 2 Bing. 447, 9 E. C. L. 475. As to dower in right of entry, see, e. g., *Virginia Code*, § 2267.

⁸⁴ *Black v. Hoyt*, 33 Ohio, 203, contra; see, also, *Walters v. Walters*, 132 Ill. 467, 23 N. E. 1120.

At common law the wife of the trustee of either an express or an implied or resulting trust, or of a mortgagee in fee, before or after forfeiture, was dowable; but as a court of equity would look upon the widow, to the extent of her thirds, as a trustee for those equitably interested in the land (for instance, for the mortgagor who was willing to redeem), and would enjoin the trustee's or mortgagee's widow from pressing her writ of dower, claims on naked legal titles fell into disuse. But in the United States this has been carried somewhat further. A man who, before marriage, sells his land by executory contract, or, as it is usually called, gives a bond for a title and receives the purchase money, is considered as a trustee for the purchaser; and if, after marriage, he gives a conveyance in compliance with his previous contract, he has only done his duty, whereof his wife cannot complain, and she has no dower.⁸⁵ On the other hand, the wife at common law was not dowable of the husband's equity,⁸⁶ nor even in land the title to which had, by a mortgage in

⁸⁵ For trustee's and mortgagee's widow, see, aside of the statement in Kent, *supra*: New York, Rev. St. pt. 2, c. 1, tit. 8, § 7; Illinois, c. 41, § 6; Arkansas, § 2577. For widow of vendor by bond: *Rain v. Roper*, 15 Fla. 121; *Rawlings v. Adams*, 7 Md. 26; *Adkins v. Holmes*, 2 Ind. 197; *Kintner v. McRae*, Id. 453; *Dean's Heirs v. Mitchell's Heirs*, 4 J. J. Marsh. 451. It is admitted in these cases that if the price has not been paid, and the vendor, unable or unwilling to collect it, rescinds the contract, his wife is dowable; and so (see first case) if his executor rescinds it after his death. The doctrine was carried to the extreme in *Oldham v. Sale*, 1 B. Mon. (Ky.) 76, where the sale was made by parol and by an infant. For resulting trusts, see *King v. Bushnell*, 121 Ill. 656, 13 N. E. 245 (the statutory husband's dower of Illinois), where the principle was admitted, the only dispute being, is the resulting trust established? And it was, though there was no writing. *Bailey v. West*, 41 Ill. 290 (principle stated). An important instance is a partner or all the partners holding lands for the partnership. No dower can be claimed by any partner's wife if it interferes with the rights of the creditors or of other partners. *Paige v. Paige*, 71 Iowa, 318, 32 N. W. 360 (though the rights of the partnership are shown by parol only); *Galbraith v. Gedge*, 16 B. Mon. (Ky.) 631; *Burnside v. Merrick*, 4 Metc. (Mass.) 537; *Howard v. Priest*, 5 Metc. (Mass.) 582 (though conveyed to the partners by individual names).

⁸⁶ This is still the law in Georgia. *Bowen v. Collins*, 15 Ga. 101. So held because no statute has changed the common law in that respect, and it seems not to have been changed by the Code. And so it was held in Tennessee (*Tipton v. Davis*, 5 Hayw. 278) that there is no dower in an "entry" under state land laws, the occupant having only an equity. Contra, as to an "improvement right" under an old Pennsylvania land law. *Kelly v. Mahan*, 2 Yeates (Pa.) 516. Kent puts it on the ground that at common law a widow was not

fee before marriage, been turned into an "equity of redemption."⁸⁷

Dower is defeated at common law if the fee of the husband is defeated during his lifetime otherwise than in consequence of a conveyance made by him during coverture; e. g. when the wife of a mortgagee was dowable, she would not be so if, by payment ad diem, the legal title had, during the husband's life, returned to the mortgagor.⁸⁸ If the land is fairly recovered in an action against him on title paramount, she loses her dower, though she was no party to the action, but an old statute gave her the right to contest a recovery taken by collusion and default.⁸⁹ Where a deed to the husband is held as an escrow, to be delivered on conditions which he does not fulfill in his lifetime, and is delivered to the heirs after his death, there is no seisin during coverture.⁹⁰

An alien woman was incapable, at common law, of gaining dower by her husband's death, as an alien cannot take by the act of the law. If this disability had not, along with those of alien heirs, been abolished by treaties, and by local statutes in almost every state, it would still be rather unimportant, on account of the act of congress which naturalizes the wives of all American citizens.⁹¹

dowable of a use, and that trust estates and other equities now take the place of uses before the statute of Hen. VIII. In North Carolina an unrecorded deed is considered as giving an equity only. Hence the widow cannot sue at law for dower in land, the deed of which was not recorded in the husband's lifetime. *Thomas v. Thomas*, 10 Ired. (N. C.) 123 (but the question of the equitable claim is left open). In England, before the act of 1833, which restricts dower to lands of which the husband dies seised, it was quite usual to turn the title of a married man into an equity.

⁸⁷ The question seems to have been fully settled in England against the wife of one who had made a mortgage before coverture in *Ambrose v. Ambrose*, 1 P. Wms. 321. Of course, if the husband pays off the mortgage and regains the title, there is dower.

⁸⁸ "The law regards the act of the wife in joining in the deed or mortgage not as an alienation of an estate, but as a renunciation of her inchoate right of dower in favor of the grantee or mortgagee, so far as respects the title or interest created by the conveyance." *Hinchliffe v. Shea*, 103 N. Y. 153, 8 N. E. 477. It is the same with a mortgage antedating the coverture.

⁸⁹ Westm. II. (i. e. 13 Edw. I.) c. 4. Re-enacted in the Revised Statutes of New York, pt. 2, c. 1, tit. 3, § 16, and similarly in many other states.

⁹⁰ *Junk v. Canon*, 34 Pa. St. 286.

⁹¹ See chapter on "Title by Descent" for this act, and for local statutes and United States treaties.

Dower is a peculiar interest. The widow is not a tenant in common with the heir. In many respects, her title is superior to his. Yet she cannot take possession of any part of the husband's lands. Her share must be allotted to her. It follows that her suit is not for possession, but for allotment; and, if there is a statutory bar to such a suit, it begins to run at once, on the husband's death, though the land be unoccupied. And it also follows that she cannot ask for a sale in lieu of partition against a single heir, where such a remedy is given to parceners, joint tenants, and tenants in common.⁹²

Dower is barred, having accrued as an inchoate interest, by marriage and the husband's seisin ("inchoate right of dower" is the common phrase) only in one of the following ways: First, if husband and wife levy a fine, or suffer a common recovery, for which cumbrous proceedings the American states have substituted a joint deed, acknowledged by husband and wife (in some states it must also be recorded) in the manner pointed out in a former chapter.⁹³ We need not speak here of the cumbrous devices which, before the dower act of 1833, were resorted to in England by purchasers of land to gain all the benefits of an ownership in fee without needing the wife's concurrence in a deed for conveying a clear title.⁹⁴

A statute of Edward I. made adultery and elopement, in the wife, unless the husband had become voluntarily reconciled to her, a ground for the forfeiture of dower, and this law has been re-enacted in several states of the Union, but rejected in others, both by legis-

⁹² Co. Litt. 34b ("she is not tenant in common with the heir"); Siglar v. Van Riper, 10 Wend. 414, 419; Anderson v. Sterritt, 79 Ky. 499; Liederkranz Soc. v. Beck, 8 Bush (Ky.) 597. According to Kent (4 Comm. 62) unassigned dower is an estate, not a mere chose in action, by the law of New Jersey, justifying her in retaining possession till it is assigned (Den v. Dodd, 6 N. J. Law, 367); also in Connecticut (Stedman v. Fortune, 5 Conn. 462), Ohio, Virginia, and Kentucky; but it seems now otherwise in the last named.

⁹³ See chapter 4, §§ 34, 35. The sufficiency of the wife's mere signature, by which she is to bar her inchoate right of dower, is treated in chapter 5, §§ 46, 48, 52.

⁹⁴ A very common mode in England was by means of a "power" in the husband (4 Kent, Comm. 51), which is found imitated in this country only in one reported case (Peay v. Peay, 2 Rich. Eq. [S. C.] 409).

lators and judges.⁹⁵ A divorce a vinculo, at common law, bars dower. Here, again, the laws of the states differ greatly.⁹⁶

The wife's dower will also be barred, under the statute of 27 Hen. VIII. c. 10,—which is, in substance, re-enacted in most of the states,—by a jointure made before marriage. The name "jointure" is derived from its being originally a joint estate settled upon her husband and her, which will, after his death, belong to her alone, for life. At law, the jointure must be of a freehold estate in land, beginning immediately upon the husband's death, and lasting at least during the wife's life, and not rendered uncertain by any condition

⁹⁵ The statute is known as Westm. II. (13 Edw. I.) c. 34. See, for its discussion, chapter on "Descent," § 32 (the wife and husband as heirs). It has been re-enacted substantially in the following states as to dower proper: New Jersey, "Dower," § 14; Ohio, § 4192; Illinois, c. 41, § 15; Delaware, c. 87, § 9; Virginia, § 2273; West Virginia, c. 65, § 7; South Carolina, § 1799; Kentucky, Gen. St. c. 52, art. 4, § 3 (now St. § 2133; enforced in *Goss v. Froman*, 89 Ky. 318, 12 S. W. 387); North Carolina, Code, § 2102 (if divorce proceedings have been set on foot); Missouri, § 4532 (*Payne v. Dotson*, 81 Mo. 145; not where the adultery is caused by the husband's disappearance, but where the wife refuses to follow the husband, *McAllister v. Novernger*, 54 Mo. 251). In New Hampshire, the statute of Edw. I. was considered in force in *Cogwell v. Tibbets*, 3 N. H. 41; but a plea to writ of dower alleging a continued living in adultery was held bad for not alleging an elopement. It is said that if the wife is taken from the husband's house, but remains away voluntarily, it amounts to an elopement; but she must be beyond his control, not living in one of his houses. According to *Hethrington v. Graham*, 6 Bing. 135, if the wife leaves the husband's house alone, and later on lives in adultery, she is within the statute. As to Indiana, see chapter on "Descent," § 32. In Georgia, adultery without elopement is enough. Code, § 1764, 6. In Pennsylvania, the statute of 13 Edw. I. is in force without re-enactment, but does not apply where the husband deserts the wife. *Reel v. Elder*, 62 Pa. St. 308. So held, also, in Delaware, under its statute. *Rawlins v. Buttell*, 1 Houst. (Del.) 224. The South Carolina version of Westm. II. c. 34, copies it in oldest English garb, including the words "if she is thereof convict," which do not mean a conviction on a libel for divorce, as this has never been so held in England. As to the contrary American decisions, see next section. The Code of North Carolina (sections 1838, 1842, 1843) bars both dower and curtesy upon a divorce a vinculo; curtesy, also, upon a divorce a mensa, if the parties die in separation; dower upon elopement; and curtesy on analogous grounds.

⁹⁶ Co. Litt. 33a. The divorce in the old English law, if from the bonds, was always pronounced for nullity in the inception. For the effect of an American divorce in the several states, see next section.

precedent, nor defeasible by any condition subsequent, not in the wife's or widow's own power. An annuity charged distinctly upon land for the wife's life is a hereditament, and would suffice.⁹⁷ If the freehold thus given instead of dower is lost by paramount title, the widow is restored to her dower.⁹⁸ In equity, a reasonable provision in money, for which the husband's estate generally is pledged, is a good jointure, if certain, and co-extensive in time with the wife's life after the husband's death.⁹⁹ A jointure at law is binding on the bride, though an infant; an equitable jointure, if reasonable in amount, and accepted by her with the consent of her parent or guardian.¹⁰⁰ As the act of 27 Hen. VIII. is silent on the subject, a jointure is not forfeited by elopement, though a condition that it should be forfeited by adultery would undoubtedly be enforced.¹⁰¹

⁹⁷ An estate to begin at the expiration of an outstanding life estate is not a good jointure. *Caruthers v. Caruthers*, 4 Browne, Ch. 500, where the life tenant survived the husband. He might have survived the widow, and she would have gotten nothing. Adequacy in value is, according to Co. Litt. 31a, not necessary to make a valid jointure. The endowment ad ostiam ecclesiae or ex consensu patris was really a jointure, and existed long before the statute; but it required the assent of the bride.

⁹⁸ *Ambler v. Norton*, 4 Hen. & M. (Va.) 23. It is said in the cases quoted as to equitable dower that the widow can lose nothing, because insolvency of the estate is an eviction, and would remit her to her dower.

⁹⁹ *Hervey v. Hervey*, 1 Atk. 562, *Jordan v. Savage*, 2 Eq. Cas. Abr. 102, (quoted in Bac. Abr. tit. "Jointure," B, 5), and other English cases on equitable dower, are fully stated in *McCartee v. Teller*, infra.

¹⁰⁰ The question was settled by the house of lords in 1761 in *Earl of Buckinghamshire v. Drury*, 2 Eden, 67-70, reversing Lord Keeper Henley's decree for the widow. The principal opinion in the case, being the advice of Wilmot, J., was published about 40 years later in "Wilmot's Opinions." The full history of the case is given by Chancellor Walworth in *McCartee v. Teller*, 2 Paige, 511, 557. The decision of the house of lords, having been made before the Revolution, is considered binding in the last-named case; also, in Pennsylvania, *Shaw v. Boyd*, 5 Serg. & R. 309. Altogether, jointures are very rare in the United States. Marriage contracts in which the bride waives dower for good consideration as a matter of contract, being of full age, are not very frequent. It was held in *Biggerstaff's Ex'rs v. Biggerstaff's Adm'r*, 95 Ky. 154, 23 S. W. 965, that a clause in an antenuptial contract excluding either party from all interest in the property of the other cuts off dower, courtesy, and distributive share.

¹⁰¹ Discussed in *McCartee v. Teller*, supra. It is said in the same case that
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A jointure settled by the husband after marriage takes effect only by the widow's acceptance after the death of her husband, which is in the nature of a contract with the heir, and not like an antenuptial jointure by his own act ("a provisione viri") as it is called. The statute gives her the right to elect between a postnuptial jointure and her dower at common law.¹⁰² The satisfaction of dower by a provision in the husband's will, between which and her dower the widow may choose, is treated in another chapter as furnishing the principal case for "election."

A bar of dower on equitable grounds was at an early date recognized by the common-law courts. Where the husband exchanged land held in fee for other land held by a like title, the widow could not claim her dower in both, but had to make her election. The rule is enacted into statute in New York, Michigan, and Wisconsin. The word "exchange" must be taken, however, in its technical sense. Where land is paid for entirely by land,—a like estate passing on each side,—however, equity would probably relieve against double dower, if there was a substantial, though not a technical, exchange of lands subject to dower.¹⁰³ But, where the wife releases her dower in the land with which her husband parts, she is entitled to dower in that which he gets in exchange.¹⁰⁴

If dower is allotted to the widow, which is lost to her by paramount title, she may recover out of the lands retained by the heir a recompense; for the assignment of dower implies a warranty. The recompense must come out of lands descended to the heir, rather than from land aliened by the husband.¹⁰⁵

a condition, annexed to an annuity by a man of 75 marrying a girl of 20, that it shall cease on her remarriage, is unreasonable, and the jointure is bad.

¹⁰² All American statutes on jointure have this distinction. As to the mode of making election, see chapter on "Estoppel and Election."

¹⁰³ 2 Bl. Comm. 104, 109, 323; New York, Rev. St. pt. 2, c. 1, tit. 3, § 3; Illinois, c. 41, § 17; Michigan, § 5734; Wisconsin, § 2161; Arkansas, § 2573 (so in Oregon and Nebraska); Wilcox v. Randall, 7 Barb. 633. The value in a technical exchange need not be equal; and this works no injustice, as the dowress has her choice.

¹⁰⁴ Stevens v. Smith, 4 J. J. Marsh. (Ky.) 64; Mosher v. Mosher, 32 Me. 412; Cass v. Thompson, 1 N. H. 65.

¹⁰⁵ Co. Litt. 384b; Bedingfield's Case, 9 Coke, 16. The assignment in gross, instead of a third of each parcel, is called "against common right." As to the

At common law, the assignment of dower required neither livery of seisin, nor a deed or writing; for the widow's estate, when assigned, referred back to the time of her husband's death, whenever she took possession under the assignment, and the statute of frauds does not seem to have changed this rule. In the United States an assignment by consent in the probate or county court can generally be had so cheaply that assignments by parol are almost unknown.¹⁰⁶

The truest and surest badge of dower, which marks it off most clearly from a mere share in the estate, is this: That it stands above all alienations or incumbrances made by the husband, and is free from liability for his debts, and from all liens for such debts. The "inchoate right" accrues as to the lands owned at or before marriage, at the moment of marriage; as to lands acquired afterwards, at the moment of acquisition. This right is older than, and superior to, any conveyance or mortgage by the husband alone; any warranty or estoppel in a deed made before acquisition; any judgment lien, elegend, extent, or other execution; and, of course, undisturbed by any specialty or other debt. For only heirs (at common law) and devisees (under the statute) are bound for the ancestor's debts; not the widow, as such, who takes her dower. This quality gives to this estate its high importance; and renders it often much more valuable than the amplest provision in the husband's will, which can never be accepted, except subject to liens and debts.¹⁰⁷

The widow's title to dower being established, her thirds must be allotted. It ought to be allotted separately in each parcel, and must be so, where these are held by several purchasers; but even

mode of relieving the widow upon eviction, when she has accepted such an assignment, see French v. Peters, 33 Me. 396.

¹⁰⁶ Co. Litt. 35a. At common law, an infant heir might assign dower, but, if the assignment was of too much, have it corrected by writ of admeasurement when he came of age. Co. Litt. 39a. The infancy of the heirs is the main cause of the modern habit of summary assignment in the county court.

¹⁰⁷ Some statutes indicate this freedom from debt by bidding the widow hold her thirds "for her own benefit." Tennessee, Code, § 324G; Florida, § 1830. The proposition is too well known to need quotation of authorities. Even where the wife is barred by the husband's sole deed, yet the dower is superior to the lien of an execution levied before the husband's death. Simmons v. Latimer, 37 Ga. 490.

when all were held by the heir, or otherwise by the same party, an allotment in gross could only be made by consent, as the widow would otherwise be subjected to a greater risk of eviction. Of course, the tenement might be such as to render a division difficult and unprofitable, or even impossible, in which cases a division of rents and profits had to be substituted; and when the husband was a parcener or tenant in common there could be no allotment of the dower in kind, before partition had been made among the part owners.¹⁰⁸ The part due to the widow is one-third in value, but when the husband has sold without the wife's concurrence, and the purchaser has put valuable improvements upon the ground, it is clear that she can be endowed only of what the land was worth without these improvements, and must take an allotment equal in value to one-third thereof.¹⁰⁹ Where the land has, after an alienation, increased in value by the growth of surrounding population, or other like causes, there is no good reason why the widow should not share in the gain (the unearned increment), and take, aside of improvements made by the alienee, one-third of the land as it stands at the time when dower is assigned. But this is a distinction which the older English authorities have overlooked.¹¹⁰

¹⁰⁸ Willett v. Beatty, 12 B. Mon. (Ky.) 172; Jennison v. Hapgood, 14 Pick. (Mass.) 345, 19 Am. Dec. 258, and note.

¹⁰⁹ Gore v. Brazier, 3 Mass. 523; Lombard v. Kinzie, 73 Ill. 446; Gale v. Kinzie, 80 Ill. 132. .

¹¹⁰ 4 Kent, Comm. 67, where the reason is urged that if, by public disaster, the land should decline in value, the widow would have to stand her share of the loss. Only American cases are quoted, Gore v. Brazier, 3 Mass. 544; Thompson v. Morrow, 5 Serg. & R. 289; Humphrey v. Phinney, 2 Johns. 484; while in New York the widow was confined to one-third of the value at the time of alienation in Dorchester v. Coventry, 11 Johns. 510, and in Shaw v. White, 13 Johns. 179. But these decisions rested on the words of a New York act (1 N. Y. Rev. Laws, 60) fixing dower "according to the value of the lands, exclusive of the improvements since the sale." One reason given is that the alienee could not on his warranty recover from the heir more than the value at the time of alienation. In the case in 3 Mass. 544, the facts did not show an increase of value from general causes; but Parsons, C. J., thought if they did the widow should have the benefit. In Powell v. Monson & Brimfield Manuf'g Co., 3 Mason, 347, 375, Fed. Cas. No. 11,356, the question did arise, and Story, J., gave the "present value, exclusive of buildings, etc., put up after alienation. The statutes of Michigan and Wisconsin give expressly one-third of the value at the time of alienation. But the Kentucky

And the inchoate right of dower can only be released by the wife, to a purchaser from the husband, by fine, or by properly acknowledged deed to him, or some one claiming under him. It cannot be conveyed separately while the husband retains the fee. Nor can it be conveyed to one party while the fee is held by another, in which respect it differs much from the husband's right of courtesy, as it stood at common law.¹¹¹

The inchoate right is not a remainder, either vested or contingent. The wife is not a necessary party to suits against her husband affecting the title to his land, though she may, as widow, falsify a collusive recovery. Her inchoate right does not arise ex contractu, nor is it vested property; and it is not within the constitutional guaranty against laws impairing the obligation of contracts, or that against laws depriving any one of his property. Hence the laws in force at the husband's death govern dower, except that it cannot be enlarged, as against a previous alienee from the husband.¹¹²

The right of dower after the husband's death is not an undivided third of the entirety, but of one-third in severalty. Nor is it one-

statute, which, like that of New York, explains "so as not to include * * * any permanent improvements he [the alienee] has made," has been construed to be declaratory of the common law, and to exclude such improvements only, and not the unearned increment (*Fritz v. Tudor*, 1 Bush, 28); while *Pepper v. Thomas*, 85 Ky. 539, 4 S. W. 297, uses broad language, which, standing by itself, would exclude both.

¹¹¹ *Harriman v. Gray*, 49 Me. 537, where a release of dower by husband and wife to his alienee was held void, because he had already sold the land by quitclaim to another. A sale of unassigned dower was held void in an Anonymous Case, 3 Cro. Jac. 151, which has been followed in *Pixley v. Bennett*, 11 Mass. 298; *Carnall v. Wilson*, 21 Ark. 62; *Jacoway v. McGarrahan*, Id. 347. And this doctrine was upheld in as late a case as *Barber v. Williams*, 74 Ala. 331, though the sale of choses in action and of "pretended titles" is otherwise good in that state. For this reason the rule was rejected as obsolete in *Strong v. Clem*, 12 Ind. 37, as, under modern statutes, as well as under modern views of equity, choses in action, generally speaking, are assignable.

¹¹² *Boyd v. Harrison*, 36 Ala. 533, 537; *Moore v. Mayor*, etc., 8 N. Y. 110; *Levins v. Sleator*, 2 G. Greene, 604; *Reynolds v. Reynolds*, 24 Wend. 193,—put it most strongly. An alienee from the husband has a vested right, and dower cannot be strengthened or enlarged as against him. *McCafferty v. McCafferty*, 8 Blackf. 218; *Given v. Marr*, 27 Me. 212; *Peirce v. O'Brien*, 29 Fed. 402. And see intimation in *Fritz v. Tudor*, 1 Bush, 28, 31, that the widow cannot be divested of her right as against the alienee.

third in quantity of the lands of which the husband died seised, but the wife is entitled to the use of such part as will yield one-third of the entire income of the whole. The right, until assignment, is inchoate, and cannot be set up as outstanding title in ejectment against him who is entitled to the fee.¹¹³

The difficulty of allotting dower in wild lands (such as timber lands) or unimproved lots, which has been met in Massachusetts by denying it altogether, has been solved in Ohio by a late statute allowing the widow or widower to apply for a sale of the property, and to take the "table value" out of the proceeds.¹¹⁴

§ 108. Modifications of Dower.

Before considering dower in the several American states, as modified by statute or by the course of modern decisions, we must name the states in which it does no longer exist, other provisions for the widow out of the lands of the husband having been put in its place. Not only in Louisiana, but also in Texas, California, Nevada, Arizona, New Mexico, Idaho, and Washington, the French and Spanish doctrine of "community property" prevails, more or less mixed with elements of English and American law, as shown in later parts of this chapter. Here dower is impossible.¹¹⁵ In the states of Indiana, Iowa, Minnesota, the Dakotas, Kansas, Colorado, Wyoming, and Mississippi, a compulsory descent of part of the husband's lands upon his widow (secure, to some extent, against his debts, or alienation without the wife's consent) has taken the part of dower; sometimes very much like it in effect. But the name "dower" has been expressly stricken out, so that the learning on this theme may no longer be applied to the new relation. We have discussed the

¹¹³ Rayner v. Lee, 20 Mich. 384; King v. Merritt, 67 Mich. 194, 216, 34 N. W. 689; Johnson v. Wilmarth, 13 Metc. (Mass.) 416; 4 Kent, Comm. 61, 62.

¹¹⁴ Act March 22, 1892. An act of February 19, 1894, enables the widow or widower to claim the table value whenever the land is to be sold in winding up an estate.

¹¹⁵ Texas has no statute abolishing dower, as it never existed there. Arizona covers the subject (sections 2100-2111) with provisions incompatible with dower. It is excluded by California, Civ. Code, § 173; Nevada, St. § 505. In Washington, § 2414 of the former Code, abolishing dower, is left out of the present statute. See Montana, Prob. Act, §§ 534, 551.

right of the widow under these statutes, to some extent, in the chapter on "Descent."¹¹⁶

In Pennsylvania, under the decedent's estate act of 1833, it would seem that there is no real dower; the widow, under it, taking a life estate in one-third (and, when there is no issue, in one-half) of the husband's lands as one of his heirs, of which she cannot be deprived by will (though she can be put to her election). This she takes in his real estate, equitable as well as legal, but, like other heirs, only after the payment of his debts and all charges. What has been sold by judicial process in his lifetime is withdrawn from her dower, unless the sale was collusive. Being an heir, she is at once a tenant in common with the other heirs. But as this and later Pennsylvania statutes still speak of "dower at common law," and as the law on deeds and mortgages provides means by which a married woman may bar her dower, a rather mixed and contradictory system has been worked out, by which the wife retains her dower in lands aliened by the husband voluntarily without her consent, though she has none in the land sold for his debts without his concurrence.¹¹⁷

In Massachusetts, the wife's dower is due only from that part of the realty left which she does not take as an heir in fee; and she

¹¹⁶ Indiana, Rev. St. § 2482; Iowa, § 2440; Minnesota, by an act of 1875 (now chapter 48, § 1); Kansas, par. 2592 (by implication); Colorado, § 1039 (which contains the canons of descent); Wyoming, Rev. St. § 2221; Mississippi, § 2291; Dakota Territory, Civ. Code, § 779. The Montana territorial law on dower was not repealed by its omission from the compilation of 1879. *Chadwick v. Tatem*, 9 Mont. 354, 23 Pac. 729.

¹¹⁷ Pennsylvania, Dig. "Dower." The name is also used in several acts later than 1833, and the words "dower at the common law" in an act of 1869 on election between will and dower. It may be sold for the husband's debts. *Kreider v. Kreider*, 1 Miles, 220. Even before 1833 there was no dower in land sold for the husband's debts. *Scott v. Croasdale*, 2 Dall. 127. For the purposes of election, this statutory dower stands on the footing of dower at common law. *Reed v. Reed*, 9 Watts, 263. The statutory one-half is awarded from the lands of tenant in tail dying without issue. *Smith's Appeal*, 23 Pa. St. 9. This dower is an interest in the land, not a lien, within the meaning of the execution law. *Schall's Appeal*, 40 Pa. St. 170 (qualifying *Kurtz's Appeal*, 26 Pa. St. 465). The husband's deed of assignment for creditors, wife not joining, does not bar her, *Helfrich v. Obermyer*, 15 Pa. St. 113; *Blackman's Estate*, 6 Phila. 160; nor his assignment in insolvency proceedings. *Eberle v. Fisher*, 13 Pa. St. 526.

has her election, within six months, between dower and the life estate in one-half which she takes after the death of a husband without issue. We have, in the chapter on "Descent," referred to a similar election in Missouri and Arkansas between dower and a child's share; and in South Carolina the widow has her choice between the "distributive share" in the husband's estate, both real and personal, and her dower. But when chosen, the dower in these states is substantially the same as at common law.¹¹⁸

In Alabama, dower retains otherwise its old common-law character, but if a woman having separate estate survives her husband, and such estate (aside of rents and income) is equal to or greater in value (at the time of the husband's death) than her dower (estimating the life estate as seven years' rent) and distributive share, she is not to have either of the latter. The separate estate named in the statute means that given to her by the constitution and statutes, not separate estate in equity. Under the statute as formerly drawn, a separate estate of less amount would diminish the dower and distributive share proportionately; and such might be the construction of the clause as it now stands.¹¹⁹

In the states of New Hampshire, Vermont, Connecticut, Delaware, Tennessee, and Georgia (and, until 1869, also North Carolina) the "inchoate right of dower" does not exist. A widow is only endowed of the lands of which the husband dies seised; but in New Hampshire the widow is, if possible, to be indemnified out of the husband's remaining lands for her thirds in those which he has disposed of, and in Connecticut the old law of dower has still many estates to work on. In Georgia dower in lands of which the title came to the husband through the wife can only be barred by joint deed, but ordinarily

¹¹⁸ Massachusetts, c. 124, § 3; for election in Missouri, see chapter on "Descent," § 32; South Carolina, Rev. St. § 1852.

¹¹⁹ Alabama, Civ. Code, § 2354; Dubose v. Dubose, 38 Ala. 238 (how to calculate); Billingslea v. Glenn, 45 Ala. 540 (at death); Wiggins v. Newberry, 72 Ala. 240 (example); Harris v. Harris, 71 Ala. 536; Huckabee v. Andrews, 34 Ala. 646 (equitable separate not deducted); Williams v. Williams, 68 Ala. 495 (compare 71 Ala. 536, examples of both kinds); Turner v. Kelly, 70 Ala. 85 (husband renouncing his trusteeship can turn statutory into equitable). Quaere, whether Glenn v. Glenn, 41 Ala. 571, and Barnes v. Carson, 59 Ala. 188, are yet law under last statute?

the vendor's widow is barred, though he have only executed a title bond or similar informal writing. The Florida statute, wholly, or in the main, preserves the widow's inchoate right.¹²⁰ And the Georgia law, though it permits the husband to bar dower by a conveyance, requires the wife's assent to a mortgage of his lands, even to a mortgage for the purchase money, in order to bar it.¹²¹

In the states of New Hampshire, Maine, and Massachusetts, there is no dower in wild lands; "except wood lots or other land used with the farm or dwelling house, nor in wild lands conveyed by the husband, though afterwards cleared."¹²²

We come now to changes for the benefit of the dowress. In Alabama, dower is by statute raised from one-third to one-half when there are no descendants of the late husband and the estate is solvent, but when there is issue or the estate is insolvent, dower remains one-third, as at common law.¹²³ In Delaware and Arkansas, also, when there is no issue, the widow is endowed of one-half; and the statute in either state says nothing about solvency. The cred-

¹²⁰ New Hampshire, c. 195, §§ 3, 5; Vermont, §§ 2215; Connecticut, § 618 (as to all marriages contracted since April 20, 1877; as to earlier marriages, if husband and wife, by recorded writing, submit to the new regime); Delaware, c. 85, § 1; Tennessee, Code, § 3244; Georgia, § 1763, modified by §§ 1764, 1765. Florida, § 1830, says, "All the lands of which her husband died seised or possessed"; but adds "or had before conveyed, whereof said widow had not relinquished her dower,"—which brings it back to dower as at common law, unless, indeed (what is highly improbable), it should be held that the widow is not dowable of lands sold for debt by the sheriff, or of which he got rid by suffering a collusive recovery. In 1784 North Carolina reduced dower to thirds in the lands of which the husband dies seised; dower as at common law was restored in 1869, but the change was declared unconstitutional as to lands then held by men then married. *Sutton v. Askew*, 66 N. C. 172. Applied in *Castleberry v. Maynard*, 95 N. C. 281; *Dixon v. Robbins*, 114 N. C. 102, 19 S. E. 239.

¹²¹ So held under act of 1826. *Cope v. Savannah Mut. Loan Ass'n*, 24 Ga. 46. As to her joint deed of lands that have come through her, see *Hart v. McCollum*, 28 Ga. 478; *Seabrook v. Brady*, 47 Ga. 650.

¹²² Massachusetts, Pub. St. c. 124, § 4 (literally); Maine, c. 103, § 2 (substantially as above); New Hampshire, c. 195, § 4 ("unless the same were, during the marriage and seisin of the husband, in a state of cultivation, or were," etc.). Long leases in Massachusetts, that go by the laws of descent, are also subject to dower. Pub. St. c. 121, § 1.

¹²³ Alabama, Civ. Code, § 1803.

itors certainly ought not to suffer through the lack of issue, but the point seems not to have been raised.¹²⁴

American statutes on the bar by jointure are at least as favorable as the best construction that can be put on the English authorities. New York, Michigan, and Wisconsin define a legal jointure as "settled on her with her assent before the marriage, provided it consists of freehold in lands for the life of the wife, at least, to take effect on the death of the husband,—such assent to be expressed, if the woman be of full age, by her becoming a party to the conveyance, and if she be under age, by her joining with her father or guardian in such conveyance"; and any pecuniary provision for the intended wife, if assented to in like manner, bars her right.¹²⁵ Other states will not allow an infant bride to bind herself in any way. Thus, in Kentucky, a conveyance of real or personal estate by way of jointure bars the widow from her election of dower only if made before marriage with her consent, and not during infancy.¹²⁶ And, generally speaking, the American courts speak more of an "antenuptial contract," by which dower and other rights of the widow are bargained away by the bride before marriage, than of a jointure, which is the sole act of the husband and which the bride only accepts by marrying with the knowledge thereof.¹²⁷

The foremost and most beneficent change which America has wrought in the law of dower is that of extending it to equitable estates of all kinds, and more especially to equities of redemption, that is, to the estate of the mortgagor; and this departure from the

¹²⁴ Delaware, c. 85, § 1; Arkansas, § 2592. See *Brown v. Collins*, 14 Ark. 421.

¹²⁵ New York, Rev. St. pt. 2, c. 1, tit. 3, §§ 9–11; Michigan, §§ 5746–5748; Wisconsin, §§ 2167–2169. It has been held in New York that, where the provision is inadequate, it should be set aside and disregarded as a fraud on the future wife, and she should have her dower. *Pierce v. Pierce*, 71 N. Y. 154. See, to the same effect, in Pennsylvania, *Kline v. Kline*, 57 Pa. St. 120 (parties do not contract at arms' length); *Kline's Estate*, 64 Pa. St. 122; *Tarbell v. Tarbell*, 10 Allen (Mass.) 278; *Woodward v. Woodward*, 5 Sneed (Tenn.) 49. The future husband and wife stand in a confidential relation and must act towards each other with the utmost fairness. But the widow can assail the jointure for fraud only as against heirs and devisees, not against purchasers for value.

¹²⁶ Kentucky, Gen. St. c. 52, art. 416 (St. 1894, § 2136). The Illinois and Missouri statutes forfeit a jointure, as well as dower, for the wife's elopement.

¹²⁷ *Spencer v. Boardman*, 118 Ill. 553, 9 N. E. 330.

English decisions seems to have been fully established when Kent wrote his *Commentaries*.¹²⁸

Missouri and some other states, grant dower by statute in any land of which another was, during coverture, seised "to the husband's use"; thus putting some kind of equitable estates on an exact footing with the legal title in land.¹²⁹

Thus in Alabama three kinds of estates are named, each of which entitles the wife to dower: (1) When the husband is seised during coverture; (2) when some one else is seised to his use; (3) when he dies possessed of a perfect equity, having paid all the purchase money. The "use" here means an express and naked trust, expressed in the same deed or will which confers the legal title on another; the perfect equity a right appearing only by an executory instrument, such as title bond, a sheriff's return of a bid at execution without the sheriff's deed, or the confirmed report of sale of a master in chancery, without the commissioner's deed.¹³⁰ As these "perfect equities" are often transferred from hand to hand in a very informal way, say, by a simple indorsement, much confusion would arise if, upon the death of a man who bought and sold such equities, his wife was allowed to overhaul his dealings, not appearing on the registries of deeds, back over a long course of years.

In Kentucky, land held by executory contract is the subject of dower only, when the husband dies seised, which would imply that in a naked trust, corresponding to the "use" at common law, the wife has, as in Alabama, an inchoate right.¹³¹ In New York, Michigan, and Wisconsin naked trusts are not recognized. The law of dower speaks only of "lands whereof her husband was seised," which would ipso facto embrace any land in which the naked title stands out in a trustee without active duties. But the one great advance over the rights of the English widow, in these as well as in other American states, is her right of dower in lands mortgaged

¹²⁸ Kent (4 Comm. 44) asserts that in 1832 the widow had dower of an equity of redemption in Massachusetts, Connecticut, New York, New Jersey, Virginia, North Carolina, and probably in most or all of the other states.

¹²⁹ For an illustration, see *Davis v. Green*, 102 Mo. 170, 14 S. W. 876.

¹³⁰ Alabama, Code, § 1892; Kentucky, Gen. St. c. 52, art. 4, § 12.

¹³¹ *Harrison v. Griffith*, 4 Bush (Ky.) 146 (dower allowed when husband seised).

before marriage, or, in the old phrase, in an equity of redemption.¹³² As to the measure of this right, hereafter.

In Iowa the statute which gives a descendible share, somewhat in the nature of dower, is broader; for the one-third is to be taken of "legal or equitable estates" possessed at any time during the marriage. Under this provision, where the husband bargains for land, pays for it in full, and then orders the deed to be made to another, he is regarded as at one time so far the equitable owner that his wife will have the legal share.¹³³

In the states which provide for the recording of executory contracts for the sale of land, such as Illinois, it is natural that the rights accruing under them should have all the incidents of property, and that the widow should have her dower out of such equities.¹³⁴

In Pennsylvania it has lately been decided that the wife is dowable of a reversion or remainder which fell in only after the husband's death; in other words, of a fee of which he never was seised in law.¹³⁵

We have elsewhere shown how married women can convey their own estates. Dower must, generally speaking, be released in like manner, except as there indicated otherwise.¹³⁶ We need only add that there is no "equitable" release; that is, a court of equity will not work out a release in favor of "meritorious parties" where dower has not been barred as provided by law. Thus, if the statute says it shall be "by deed," and there is no law dispensing with seals, dower can be barred only by a sealed instrument. Any other, though fully acknowledged, is worthless; equity will not aid it, as

¹³² New York, Rev. St. pt. 2, tit. 3, c. 1, § 1; Michigan, Ann. St. § 5733; Wisconsin, Ann. St. § 2159.

¹³³ Everitt v. Everitt, 71 Iowa, 221, 32 N. W. 273, distinguishing Beck v. Beck, 64 Iowa, 155, 19 N. W. 876, where the husband at the time of purchase had the title made to his son, and was never the equitable owner.

¹³⁴ Illinois, Rev. St. c. 41, § 1 ("though title completed after his death"). See Tink v. Walker, 148 Ill. 234, 35 N. E. 765, as to what is a dowable equity within the law.

¹³⁵ Wilson v. Ott, 160 Pa. St. 433, 28 Atl. 848.

¹³⁶ See South Carolina, Rev. St. §§ 1796-1798, for manner of renouncing dower by a separate notarial instrument indorsed upon the deed, other deeds not being acknowledged.

it would decree the execution of a good deed against a vendor for value who had omitted to seal his conveyance.¹³⁷

While a few of the American states have recognized or re-enacted the statute of elopements, the courts of Massachusetts, Maine, Rhode Island and New York (where it was once re-enacted and then repealed) have rejected it as inapplicable to our system. In the first place, dower is in those states regulated by statute, and the courts felt they had no right to add one more to the modes of barring dower found in the statute; and, next, all these states furnish to the injured husband the means of ridding himself, by a suit for divorce, of a faithless consort; and it is better that the title to lands should rest on a decree entered before the husband's death than on matters in pais.¹³⁸ When a divorce from the bonds is obtained, the former wife can never be the former husband's widow, and the simplest rule would be to cut off dower, courtesy, and all marital rights in all cases alike, but to discriminate between the guiltless and the guilty party by a decree in the divorce proceeding as to division of property and maintenance; and this is so enacted in Kentucky, where a divorce a vinculo in all cases puts an end to dower, courtesy, and distributive share; and a divorce granted by a court in another state, that has jurisdiction, is recognized in the court of the state in which the land lies.¹³⁹

¹³⁷ Manning v. Laboree, 33 Me. 347. So in French v. Peters, Id. 396, the wife's indorsement of a separate instrument on the back of the deed, not being in accordance with the words of the law, was held ineffectual. This verifies the saying of Lord Bacon that the law favors three things: "Life, liberty, and dower." To same effect is Co. Litt. 124b.

¹³⁸ Lakin v. Lakin, 2 Allen, 45; Littlefield v. Paul, 69 Me. 527; Bryan v. Batcheller, 6 R. I. 543. The New York Revised Statutes say that "in case of divorce dissolving the marriage contract for the misconduct of the wife she shall not be endowed"; and elsewhere that, if she be convicted of adultery in a suit for divorce brought by the husband, she forfeits her dower. In Pitts v. Pitts, 52 N. Y. 593, and Schiffer v. Pruden, 64 N. Y. 47, the latter provision (section 48 of title on "Divorce") has been nullified; for nothing is deemed a conviction of adultery except a sentence of divorce on the husband's demand.

¹³⁹ Hinson v. Bush, 84 Ala. 368, 4 South. 410, overruling Williams v. Hale, 71 Ala. 83, where an inference as to other divorces to the contrary had been drawn from a statute forfeiting dower for adultery. For Kentucky, see Gen. St. c. 52, art. 3, § 6 (now St. 1894, § 2121); Arnold v. Arnold, 8 B. Mon. 204; Butler v. Cheatham, 8 Bush, 595.

It is otherwise in Connecticut, where a wife divorced not for her fault, and who has not been awarded alimony, retains her right to dower;¹⁴⁰ and in Massachusetts and Maine and Michigan, where the wife obtaining a decree for the husband's adultery or misconduct gains a right to have her dower at once, without waiting for his death, but must bring a new action for it, the divorce court not allotting it to her as part of the remedy;¹⁴¹ and in Ohio, where she has her dower at the husband's death, if the divorce has been granted to her in the courts of that or any other state, on account of his "aggression";¹⁴² and in Tennessee, where the successful party in the suit for divorce, obtaining the decree, retains his or her marital rights; and so in Missouri, where the wife retains dower after a divorce granted for the husband's fault.¹⁴³

A radical reform has been effected in the method of allotting dower, where the decedent dies seised of several distinct lots or tracts. Almost every state has a statute, which authorizes the laying off the widow's thirds in one or a few parcels, instead of giving her a third of each; always with a provision for indemnifying her by a new allotment, if any of the parcels first assigned should become lost to her by eviction under superior title. And we shall see, under the head of "Quarantine," how far the principle of making the widow share in the rents and profits has been carried.¹⁴⁴

¹⁴⁰ Gen. St. § 618; *Appeal of Seeley*, 56 Conn. 202, 14 Atl. 291.

¹⁴¹ Massachusetts, c. 146, § 28; Maine, c. 60, §§ 9, 10; Michigan, *How. Ann. St.* § 6246; *Rea v. Rea*, 63 Mich. 257, 29 N. W. 703; *Smith v. Smith*, 13 Mass. 231 (must bring suit for dower).

¹⁴² Ohio, *Rev. St.* § 5699; *McGill v. Deming*, 44 Ohio St. 645, 11 N. E. 118 (where "aggression" is defined). Divorce granted in California.

¹⁴³ Tennessee, § 3330, deprives wife of dower when divorce is given to husband, while in that case he retains his courtesy; the position of the text follows plainly. For Missouri, see *Rev. St.* § 4526. She must wait till husband's death, *Hunt v. Thompson*, 61 Mo. 148.

¹⁴⁴ Thus New York Code Civ. Proc. §§ 1609 et seq., direct what shall be done when it is not practicable, or not for the benefit of the parties in interest, to set out for the dower a part of each tract by metes and bounds. The statutes of Massachusetts provide for paying over to the widow in such cases one-third of the rents and profits; and there are similar statutes in nearly all the states. As to laying off one dower tract from several parcels, see, for instance, Kentucky, *St.* 1894, § 2141; *Morgan v. Conn*, 3 Bush, 58; and, before any statute on the subject, *Lawson v. Morton*, 6 Dana, 471, holding that, if

Another reform of the law of dower is the result of the science of vital statistics. In some states under statutes to that effect, in others upon their own initiative, the courts have undertaken in cases of a judicial sale with the widow's consent to turn her dower, inchoate or accrued, into a percentage of the fee-simple value as shown by a sale. The accrued dower, at the husband's death, is simply one-third of the value of a life estate at the widow's age, calculated upon the ruling rate of interest, which for this purpose is reckoned either at 5 or at 6 per cent., generally at the latter rate. We append, in a note, a table which runs for all ages from birth to 95 (we begin at 16).¹⁴⁵

possible, where lands have been sold, the dower should all be taken out of what has descended.

¹⁴⁵ The tables in common use are based upon the Wigglesworth tables of mortality, and follow below for all ages from 16 to 95 years; all upon the basis of a fee simple worth \$100. The figures first given for each age have been calculated at 5, the other figures at 6, per cent. It should be borne in mind that the value of a life estate for a given age is much smaller than that of an estate for a term of years equal to the mean expectations of life, as any reader with a mathematical turn of mind will be quick to perceive:

Age.	5 pct.	6 pct.									
16	23.29	24.63	38	21.25	22.83	60	15.77	17.53	82	6.29	7.27
17	23.21	24.56	39	21.12	22.72	61	15.34	17.08	83	5.95	6.88
18	23.14	24.49	40	21.00	22.61	62	14.89	16.61	84	5.70	6.60
19	23.06	24.42	41	20.88	22.51	63	14.42	16.12	85	5.63	6.53
20	22.99	24.36	42	21.75	22.40	64	13.93	15.59	86	5.18	6.01
21	22.92	24.30	43	20.64	22.30	65	13.40	15.03	87	4.78	5.55
22	22.84	24.23	44	20.52	22.21	66	13.02	14.63	88	4.49	5.23
23	22.76	24.16	45	20.40	22.10	67	12.63	14.22	89	4.36	5.08
24	22.69	24.10	46	20.16	21.88	68	12.23	13.80	90	4.68	5.46
25	22.62	24.05	47	19.92	21.65	69	11.83	13.36	91	4.14	4.84
26	22.54	23.97	48	19.67	21.41	70	11.41	12.91	92	3.50	4.10
27	22.43	23.89	49	19.42	21.17	71	10.98	12.45	93	2.86	3.37
28	22.38	23.78	50	19.15	20.91	72	10.55	11.98	94	2.25	2.61
29	22.29	23.69	51	18.87	20.63	73	10.11	11.50	95	1.73	2.04
30	22.12	23.59	52	18.58	20.35	74	9.68	11.04			
31	22.01	23.50	53	18.23	20.05	75	9.25	10.57			
32	21.91	23.42	54	17.96	19.74	76	8.81	10.08			
33	21.82	23.33	55	17.64	19.42	77	8.36	9.59			
34	21.74	23.25	56	17.29	19.08	78	7.93	9.10			
35	21.63	23.17	57	16.94	18.72	79	7.51	8.63			
36	21.50	23.06	58	16.57	18.34	80	7.11	8.19			
37	21.38	22.94	59	16.18	17.94	81	6.69	7.72			

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volume of Bush's
Kentucky Re-
ports.

The tables giving the value of the inchoate right of dower (during the husband's life) make each value depend on the age both of the wife and of the husband. The chances of the dower never taking effect, by the latter's living longer than the wife, and the necessity of waiting till the husband's death, are both taken into consideration. The table most in use is that published by

§ 109. Curtesy.

The counterpart of dower is the husband's courtesy. The husband has at common law the right to enjoy for life land of which his wife is at any time during coverture seised in fee simple (absolute or defeasible) or in fee tail, provided there was issue born alive to the marriage; and this is the tenancy by the courtesy of England (per legem Anglicanam). This is still the law of more than 20 American states, and, with the exception of Pennsylvania, the requirement of issue born alive remains one of the conditions upon which it is enjoyed, where it bears its old name.¹⁴⁶

Prof. Bowditch. It can be found in the late editions of the General Statutes of Kentucky, and in 78 Ky. 202, 203. The ages are arranged mostly at intervals of two years, but the values of the odd years can be interpolated without material error. The values are much smaller than would be generally assumed. Thus, where the husband is 50 years old, and the wife 40, her inchoate right of dower in a fee simple worth \$100 is only \$5.61. Where a court, as against an insane or infant wife, orders a sale free of dower, and wishes to ascertain the value of the release imposed upon such wife without her consent, as was done in the case of *Fichtner v. Fichtner's Assignee*, 88 Ky. 355, 11 S. W. 85, such a table comes into requisition. Under the bankrupt law of 1867 it was quite usual for assignees to allow this table value for a release of dower to the bankrupt's wife, if she was willing to accept it. A table of values of life estates, calculated at 6 per cent. on the Northampton life tables, can be found in the Annotated Wisconsin Statutes under section 3871. The sums for each age answer to a yearly interest of \$1.00,—that is, to a capital of \$16.66 $\frac{2}{3}$. The Northampton tables have also been recommended in Missouri in *Graves v. Cochran*, 68 Mo. 74; and it was said in that case, following *Moore v. White*, 61 Mo. 442, that a third of the taxes accruing in the husband's lifetime ought not to be deducted from the widow's share. The Northampton table of values of life estates is set out as part of the Code of Virginia, under section 2281, and in the West Virginia Code, c. 65, § 17. See *Wilson v. Davisson*, 2 Rob. (Va.) 384, and *Hull v. Hull's Heirs*, 26 W. Va. 1, as to compensation for dower rights by these tables. In Alabama the "American Mortality Table" is recognized. *Gordon v. Tweedy*, 74 Ala. 232. For estimates of dower value as directed by Civ. Code, § 2346, see *Gordon v. Tweedy*, 71 Ala. 202; *Sherard v. Sherard*, 33 Ala. 488.

¹⁴⁶ Co. Litt. 29a; 4 Kent, Comm. 27-35. The Pennsylvania intestate act of 1833 dispenses with birth of issue (Dig. "Intestates," 4), so that the husband gained a freehold by the very marriage (*Lancaster County Bank v. Stauffer*, 10 Pa. St. 399). But the law applies only where the estate was subject to devise; not to an estate tail or defeasible fee. *McMasters v. Negley*, 152 Pa. St.

Those states which have chosen the French and Spanish régime of "community property" in place of the common-law or American relations between husband and wife, and those states which have repealed dower, replacing it by a forced heirship on the part of the widow (which two groups of states we have enumerated in the preceding section), have, in the very nature of things, no room for the institution of courtesy.¹⁴⁷ Moreover, the states of Ohio (1887), Illinois (1874), Maine (as to land acquired since 1844), and Kentucky (1894), while preserving the widow's dower substantially unchanged, have reduced the husband's life estate from the entirety to one-third, calling it "dower," and have as a slight compensation, made it independent of the condition of issue born alive.¹⁴⁸ Moreover, in South Carolina and Georgia, for more than 100 years, courtesy has gone out of use; being superseded or swallowed up by the lesser or greater benefits which the husband has under the marital laws, and rules of descent.¹⁴⁹

At present, we may assert, the same tests are applied to the validity of the marriage for the purposes of courtesy as for those of dower; for it may be assumed that a marriage within the age of consent, unless ratified by cohabitation after that time, would not now be held good for either purpose.¹⁵⁰

As to the time of the seisin,—whether at the time of the feme's 303, 25 Atl. 641. Otherwise the allowance of courtesy implies "after issue born alive." Ryan v. Freeman, 36 Miss. 175. Children born before and legitimated by wedlock are counted. Hunter v. Whitworth, 9 Ala. 965.

¹⁴⁷ See sections 108 and 112 of this chapter; also, chapter on "Title by Descent," § 33.

¹⁴⁸ Ohio, Rev. St. § 4188 ("every widow or widower," etc.); Illinois, c. 41, § 1; Kentucky, St. 1894, § 2132, etc.; Maine, c. 65, §§ 6, 7, and c. 103, § 14 (in a solvent estate it is one-half, when there is no issue).

¹⁴⁹ Not abolished in terms by the present Revisions. "In South Carolina, courtesy *eo nomine* has ceased by an act of 1791 which gives to the husband," etc., "the same share of her real estate as she would have taken out of his," etc. In Georgia, also, a tenancy by the courtesy does not exist, because all marriages since 1785 vest the real equally with the personal estate of the wife in the husband." 4 Kent, Comm. 20. Marital rights in Georgia have latterly been somewhat curtailed; but there is still no room for courtesy.

¹⁵⁰ Thomas, in note B to his Co. Litt. p. 557, says: "It is laid down by Sir William Blackstone (2 Comm. 117) that the marriage must be 'canonical and legal'; but this expression seems too general," etc. And he distinguishes between void and voidable marriages.

death, or at any time during coverture,—but little difficulty can arise in those states in which a married woman can alien her lands only with the husband's assent and joint deed; for, if she ever is seised, she must remain so to the time of her death, unless he had joined in a deed, and such deed or written consent, even though it might not contain apt words for granting his own estate, would estop him from claiming an estate incompatible with her conveyance.¹⁵¹ But where all, or nearly all, of the lands of the wife, under modern statutes, are made her "separate estate," of which she can dispose by her sole deed, at pleasure, and without the husband's assent, the question must arise at once, what becomes, after her sole deed, of the husband's courtesy? It stands on a higher level of vested right, not only than an heir's right of descent, but even than dower; for as soon as issue is born alive the husband has, at common law, a vested life estate in the wife's land, of which the courtesy is only the portion later in point of time than the tenancy in right of the wife.¹⁵² In some states in which the wife cannot alien her own lands without the husband joining in the deed, she may yet make contracts on which judgments and executions can be had against her, and her estate may be sold by the officers of the law. This should no more affect the husband's inchoate courtesy than a sale of his lands for his debts would affect dower. But in New York, wherever the married women's acts of 1848 and 1849 apply, the wife can cut off the husband's courtesy by deed or will.¹⁵³ In Wisconsin the statute allows courtesy only in lands not disposed of by the wife, by her will, just like the law of descent. No birth of issue is required. If the wife has children by a former husband, they take their shares free of courtesy; hence, if there are children by the last and by a former husband, the courtesy is cut down to a life estate in the shares of the children by the last.¹⁵⁴ It was held

¹⁵¹ *Waters v. Tazewell*, 9 Md. 291; *Hutchins v. Dixon*, 11 Md. 29, 37; *Sayers v. Wall*, 26 Grat. (Va.) 354.

¹⁵² *Lang v. Hitchcock*, 99 Ill. 550.

¹⁵³ But see *Hatfield v. Sneden*, 54 N. Y. 280. It seems that by a clause of the married woman's act of 1860, repealed in 1862, courtesy was reduced to one-third. Quaere, to what marriages, acquisitions, and deaths does this law of 1860–1862 apply?

¹⁵⁴ Wisconsin, St. § 2180; *Kingsley v. Smith*, 14 Wis. 390; *Westcott v. Miller*, 42 Wis. 454.

in New York, after the passage of the married women's acts of 1848 1849, 1860, and 1862, that these acts could not operate upon lands owned by the wife before their date, so as to deprive the husband of his initiate courtesy through the sole deed which those acts enabled her to make, but that when lands were acquired by a woman, then married, after the date of these laws, they took effect upon them, as the marriage alone, without the present ownership of land, confers on the husband no vested right. The constitutional question is thus pretty well disposed of in New York by the lapse of time, but the precedents there set are of importance for other states.¹⁵⁵

Though at common law, before the statute of uses, the husband could not be tenant by the courtesy of a use, it is now settled (and was clearly so settled long before the days of Kent) that he may be tenant by the courtesy of an equity of redemption, i. e. of the wife's lands mortgaged by her before coverture, or by husband and wife after coverture, joining in a fine for that purpose during coverture, and of lands in which the wife has only an equitable seisin, as cestui que trust; and if the wife's money is to be laid out in the purchase of land, and a court of equity could decree such investment, the husband has courtesy, though the purchase is not made till after her death. There is some conflict of opinion as to the husband's rights in a so-called "separate estate," and we subjoin in a note some authorities on this thorny subject.¹⁵⁶

¹⁵⁵ *Ryder v. Hulse*, 24 N. Y. 372; *Lawrence v. Miller*, 2 N. Y. 245; *Hatfield v. Sneden*, 54 N. Y. 280; *Tienmeyer v. Turnquist*, 85 N. Y. 516.

¹⁵⁶ This right of the husband to have courtesy out of an equitable title, while the wife is denied dower, has been often put upon the simple ground that "men make the law"; but it has been thoroughly repaired by the men of our time. Kent (4 Comm. 31) cites, for the proposition, *Sweetapple v. Bindon*, 2 Vern. 536 (money to be laid out in land treated as land); *Watts v. Ball*, 1 P. Wms. 109 (courtesy under a trust to pay donor's debt and convey residue to the feme); *Chaplin v. Chaplin*, 3 P. Wms. 229 (wife had trust interest of a rent in fee); *Casborne v. Scarfe*, 1 Atk. 603 (mortgaged land of wife not redeemed during coverture); *Cunningham v. Moody*, 1 Ves. Sr. 174 (money to be laid out in land under marriage articles); *Dodson v. Hay*, 3 Brown, Ch. 404 (money to be entailed on issue, husband of daughter has equitable courtesy). As to separate estate, three American cases (*Stewart v. Stewart*, 7 Johns. Ch. 229; *Donnington v. Mitchell*, 2 N. J. Eq. 243; *Cooney v. Woodburn*, 33 Md. 320), which are quoted in favor of courtesy, turned on personal property; and

Courtesy, like dower, cannot exist where the decedent had an estate for years, or a leasehold, though in such cases the husband may, under the law of distribution, have a more beneficial estate. If the wife had a defeasible fee, or a fee tail, the husband has courtesy, though her death without issue puts an end to her tail general, or operates to defeat her fee. The precedents on dower or courtesy are quoted and discussed indiscriminately in cases arising from either.¹⁵⁷

The seisin of the wife must, under the old common-law rule, have been a seisin in fact at the time of the wife's death, which excludes,

in all of them the husband was given the same right, as sole distributee, as he would have in ordinary personality. In *Waters v. Tazewell*, 9 Md. 291,—trust of a leasehold,—the husband was excluded as distributee by the peculiar words of a limitation over; and this proves nothing. In *Ward v. Thompson*, 6 Gill & J. 349, words in a marriage contract, by which the future husband abandoned all rights in the bride's property, were held to exclude courtesy. In *Jones v. Brown*, 1 Md. Ch. 191, under a marriage contract reserving to the wife dominion of her property, the husband was allowed his courtesy. In *Payne v. Payne*, 11 B. Mon. 138, the separate estate was made up of personality, slaves and land. The opinion awards only the first and second to the husband, but the decision seems to allow the courtesy. In *Hart v. Soward*, 14 B. Mon. 243, under an antenuptial agreement that the wife shall hold her land and slaves, to her separate use, the husband was given his life estate in the slaves, not in the land, only because there had been no issue born alive. In *Tillinghast v. Coggeshall*, 7 R. I. 383, the settlement securing to the wife the rents and profits of her estate, courtesy was awarded. *Carrington v. Richardson*, 79 Ala. 101, 105, leaves the question of courtesy in separate estate in doubt, but by dictum asserts the power of the feme to cut it off by her last will. The earlier case (*Grimball v. Patton*, 70 Ala. 626, 633) must have gone against the husband for want of issue born; but it was also held that the "words of exclusion" of marital right were effective after the wife's death, relying on several older Alabama cases. In *Bottoms v. Corley*, 5 Heisk. 1, 6, it is said to be a settled doctrine of the law that there is no courtesy in separate estate. Some old English cases, and *Houghton v. Hapgood*, 13 Pick. 154, are relied on. None of them bears on the question. The English cases (*Roberts v. Dixwell*, 1 Atk. 607, as commented on in *Fearne on Contingent Remainders*, and *Morgan v. Morgan*, 5 Madd. 408) favor the husband's courtesy. Her right to will the land away from him has generally been conceded, though her power to devise the fee to him was doubted in *Harris v. Mott*, 14 Beav. 169.

¹⁵⁷ See section 107, note 83. Compare *Co. Litt.* 30a, with *Id.* 30b. See, also, *Taliaferro v. Burwell*, 4 Call (Va.) 321; *Buchannan v. Sheffer*, 2 Yeates (Pa.) 374; *Hatfield v. Sneden*, 54 N. Y. 280.

not only land of which the husband and wife were ousted by adverse possession, but wild and uncultivated land, of which actual possession is not taken by any one. The reason usually given is that the husband has the right and power to take possession of his wife's lands, and that if he fails to do so, and thus exposes her to risk of loss, he should be punished by losing the life estate which he might have earned by vigilance. In Connecticut the rule has never been recognized, but the husband has been allowed to take his courtesy though the wife's land was held adversely,¹⁵⁸ and in other states no pedis possessio has been required of wild lands, except in Kentucky, where land, under the unfortunate land system of that state, is so often lost through the failure of taking possession that the court thought the infliction of the common-law penalty on the husband for not taking possession was perfectly right.¹⁵⁹

A divorce from the bonds of matrimony, pronounced by a competent court, whether obtained by the husband or by the wife, for his fault or for hers, makes an end to the status of the husband, and he is no longer a possible tenant by the courtesy. And, while

¹⁵⁸ *Bush v. Bradley*, 4 Day, 298; *Heath v. White*, 5 Conn. 228; *Kline v. Beebe*, 6 Conn. 494,—the decisions all referring to the law as such “in this state.”

¹⁵⁹ *Jackson v. Sellick*, 8 Johns. 202. Here Kent, C. J., relies on Co. Litt. 29a, where the case is put of the heiress of an advowson, or of a rent in fee, and no vacancy occurs nor rent falls due before her death, et impotentia excusat legem. Also, Lord Hardwicke's decisions in *De Grey v. Richardson*, 3 Atk. 469, and *Sterling v. Penlington*, 7 Vin. Abr. 149, pl. 11. In the latter the wife had been denied possession by a tenant in common, who mistakenly thought that her right as heir had not accrued. In *Davis v. Mason*, 1 Pet. 507, as to courtesy in wild lands in Kentucky, the supreme court of the United States followed the New York case; but the court of appeals of Kentucky held otherwise in *Neely v. Butler*, 10 B. Mon. 48, and in *Conner v. Downer*, 4 Bush, 631, where the result was to hasten the bar of limitations against the heirs, which otherwise would have been suspended during the husband's life; and, though courtesy was abolished in 1894, the rule will serve this purpose for a long time yet. In *Westcott v. Miller*, 42 Wis. 454, the question as to wild lands is left undecided, with an intimation in favor of courtesy. A “potential” seisin is said to be sufficient in *Buchanan v. Duncan*, 40 Pa. St. 82, where certain privileges in a farm given by the wife's father, in his will, to her mother, were held not to be a life estate so as to deprive her of seisin in law. Possession of trustee is enough as to trust estate. *Cushing v. Blake*, 30 N. J. Eq. 689.

there are many exceptions herein as to dower, Tennessee alone allows courtesy to a divorced husband, subject to such orders regarding the property as may have been made in the decree.¹⁶⁰

The common law and the early English statutes did not apply as high a standard to the conjugal faithfulness of the husband as to that of the wife, and there was no counterpart to the statute of elopement; but in our own days several of the American states have, in this as well as in other respects, tried to establish something of an equality of rights between the spouses, and laws have been enacted forfeiting the husband's courtesy, or his statutory share by descent or his so-called "dower," if he should abandon his wife, and live in adultery, without reconciliation and reunion before death.¹⁶¹

Where, as in New Jersey, the wife cannot devise her land, as against the husband's courtesy, his assent to such a devise does not lend life to it; it remains void. The only method to transfer his life estate after her death to another is by a joint deed of husband and wife.¹⁶²

Where the lands of the deceased wife must be judicially sold, either for the satisfaction of debts or for partition, it is quite usual, in modern practice, to pay to the husband the value of his courtesy according to the life tables, just as we have shown it to be usual with regard to the wife's dower. How far either party—the life tenant or those in reversion—can be compelled to submit to such an arrangement, is not quite clear, though, when the sale is under a lien superior to the interest of both, the only alternative would be to reinvest the surplus upon the same limitations.¹⁶³

¹⁶⁰ Aiken v. Suttle, 4 Lea, 103. The preceding cases of Gillespie v. Worford, 2 Cold. 632, and Aiken v. Mumford, unreported, referred to and followed, grew out of the same divorce. Under section 3329 of the Tennessee Code, when the divorce is obtained at the instance of the husband, he does not lose his rights in the wife's lands.

¹⁶¹ Illinois, Rev. St. c. 41, § 15; Indiana, Rev. St. § 2497; North Carolina, Code, § 1845.

¹⁶² Middleton v. Steward, 47 N. J. Eq. 293, 20 Atl. 846, where, after a devise by consent, the husband's creditors levied on his courtesy.

¹⁶³ Hunt v. Hunt, 10 N. J. Eq. 315; Rusling v. Bray (1884) 38 N. J. Eq. 398 (cited in Stew. N. J. Dig.).

§ 110. Quarantine and Widow's Award.

The seventh chapter of Magna Charta, after securing to the widow her dower, proceeds: "And she may remain in the mansion house of her husband forty days after his death, within which time her dower shall be assigned." From the number 40 this right is called her "quarantine." It has been much enlarged by American practice and legislation, and is now a serious incumbrance on the heir's estate. The short clause in Magna Charta ordains how soon dower shall be assigned, but provides no means of enforcement, and does not (at least, not expressly) authorize the widow to keep possession any longer, if dower is not assigned within that time.¹⁶⁴ The New York statute puts it thus: "A widow may tarry in the chief house of her husband forty days, whether her dower be sooner assigned or not." Her stay is free of rent, and "she shall have, in the meanwhile, her reasonable support out of the estate of her husband." This support is a charge on the whole estate, lands as well as chattels, and may, if the land be unproductive, fall on the corpus when there is no income.¹⁶⁵ But the Western and Southern states generally go further. Thus, in Michigan: "A widow may remain in the dwelling house of her husband one year after his death," free of rent, "and shall have her reasonable sustenance out of his estate for one year."¹⁶⁶ The Kentucky statute omits entirely any time limit. The widow "shall hold the mansion house, yard, stable, and lot in which it stands, and an orchard if there is one adjoining any of the premises aforesaid, without charge therefor, until dower is assigned her."¹⁶⁷ In many of the Western states (such as have abolished dower *eo nomine*; such, also, as have retained it), the homestead right of the widow is so extensive as to leave no room for the widow's quarantine. Thus, the statute of Wisconsin is silent on the subject. A few provisions as to the

¹⁶⁴ Magna Charta, c. 7. It can be found printed with most of the state compilations.

¹⁶⁵ Rev. St. pt. 2, c. 1, tit. 3, § 17.

¹⁶⁶ How. St. § 5755.

¹⁶⁷ Kentucky, Gen. St. c. 52, art. 4, § 8; St. 1894, § 2138.

limitations and length of quarantine in other states, under their statutes, are appended in a note.¹⁶⁸

Quarantine is an incident of dower, and does not exist where the latter does not. Thus, it cannot be maintained against the foreclosure of a mortgage that is superior to dower; nor in a rented mansion house, as there is no dower in a leasehold.¹⁶⁹

While the right of the widow to damages for the detention of the mansion does not fall within the scope of this work, as it does not affect the title, there is a modern substitute for these damages which does. It is the sound and simple provision, which many of the statutes couple with the quarantine, that until dower is assigned, the widow shall have one-third of the income of the estate, or of "the rents and profits." Such a provision makes her at once a tenant in common with the heirs; and as the widow has generally the readiest means of obtaining possession, she is no longer put to her suit for dower. It becomes the interest of the heirs to hasten the assignment.¹⁷⁰

The widow's award is certain personal property,—such as household goods, wearing apparel, farming implements, cows, horses, and other domestic animals, and sums of money in place of such chattels as are not on hand; sometimes property of any kind, of a value in money set forth in the statute (the amounts differ greatly in the several states),—which must be set aside to the widow for her own benefit and that of her infant children before the debts of the estate can be paid, and, of course, before there can be a distribution. In some states (e. g. in Kentucky), this widow's award can be taken out of the personality only. If there is no personality, or not as much as the law sets aside for the widow, she has no remedy.¹⁷¹

¹⁶⁸ Maine, 90 days; New Hampshire, 40 days; Vermont, until dower assigned (with heirs); Connecticut, until estate sold or distributed; Rhode Island, 12 months; Virginia, till dower is assigned; West Virginia, the same (mansion and curtilage).

¹⁶⁹ Young v. Estes, 59 Me. 441; Voelckner v. Hudson, 1 Sanf. (N. Y.) 215.

¹⁷⁰ E. g. Kentucky, St. 1894, § 2138.

¹⁷¹ Kentucky, Gen. St. c. 31, § 11; St. 1894, § 1403. The award seems not to be a charge on the land by the law of the following other statutes: Maryland, art. 93, §§ 298, 299; Michigan, § 5813 (maintenance from personality and income of land) and § 5847; Wisconsin, § 3935, subsecs. 1, 2; Tennessee, Code, §§ 3124-3128; West Virginia, c. 65, § 8, referring to chapter 41, § 27; Virginia,

The title to land can therefore not be affected. But it is otherwise in most of the states, especially in those which have thrown real and personal property into one mass in the distribution of decedents' estates.¹⁷²

The widow's award may, under the present laws (generally speaking), be claimed, whether the decedent died testate or intestate. It becomes a lien as well on devised as on descended lands.¹⁷³ The Rhode Island statute differs herein from those of all other states. It gives to the probate courts power to increase the widow's dower at common law, when the estate is solvent, by such further allowance by way of life estate in additional lands "as may be suitable to her situation."¹⁷⁴

The Mississippi statute also deserves attention. The appraisers must, if the exempt articles and provisions are insufficient, allow money in lieu thereof, or in addition thereto, necessary for the comfortable support of the widow and children (or widow or children), necessary wearing apparel, and tuition for the children, for

§§ 3640-3642; New Hampshire, c. 195, § 2; Massachusetts, c. 135, §§ 1, 2; Maine, c. 65, § 25; Minnesota, c. 51, § 1, subds. 1, 2; Delaware, c. 89, § 16; Kansas, § 2833 (all personal property exempt from execution); Vermont, § 2109 (out of personality and income). In New York, the award is from the personality only (part 2, c. 6, tit. 3, §§ 9, 10); but quære as to the sustenance for 40 days "out of the estate"; New Jersey, "Orphans' Court," § 52; Wyoming, Rev. St. §§ 2063, 2064, 2131, 2132 (award of chattels made good out of personality only).

¹⁷² Connecticut, Gen. St. § 604 (out of any estate); Pennsylvania, Dig. "Decedent's Estates," pl. 64 (real or personal property to the value of \$300, testate or intestate). This takes precedence of debts. She has her share out of the residuary. Iowa, § 2419 (where widow's award is given priority over the debts of the decedent); Nebraska, § 1235 (if personality and income insufficient, out of lands); Idaho, § 5443 (family allowance preferred to debts); Montana, Probate Act, § 138 (estate of not over \$1,500 in value turned over to widow and children); Nevada, §§ 2791, 2792 (family allowance preferred to debts); California, Code Civ. Proc. §§ 1464-1467 (family allowance made by superior court ranks above debts); to same effect, Dakota Territory, Prob. Code, §§ 129-133. Quære, as to Missouri, c. 1, § 106 (provisions not on hand to be made up from assets of estate). The Oregon Code, taking §§ 1121, 1141, and 1145 together, seems to contemplate, in case of need, the sale of land for the family allowance.

¹⁷³ Williams' Case, 3 Bland (Md.) 186; Bonner v. Peterson, 44 Ill. 253.

¹⁷⁴ Rhode Island, c. 185, § 4.

one year; and in like manner for the infant children of a deceased mother. This allowance has been construed to be a charge upon the estate, solvent or insolvent, and may go to the widow and children by another wife, in cases of testacy as well as intestacy.¹⁷⁵

In Illinois, also, it has been held that the "award" to widow or children, residing in the state, of one who dies testate or intestate, and which the statute sets above "debts, charges, and bequests," may be the basis for an application to sell the land, if it cannot be made good out of the personality; but the order of the county court on the report of the appraisers is not conclusive on the heirs.¹⁷⁶

§ 111. Community.

The first text-book on the subject of this and the following section, from the pen of Richard A. Ballinger, Port Townsend, Wash., has appeared in 1895, under the title of "A Treatise on the Property Rights of Husband and Wife under the Community or Ganancial System, Adapted to the Statutes and Decisions of Louisiana, Texas, California, Nevada, Washington, Idaho, Arizona, and New Mexico." Ganancias or gains—the French acquêts indicate the sharing of all earnings or profits by husband and wife during their wedded life. In New Mexico the old Spanish-Mexican law was never codified, and Judge Ballinger, in his Appendix of Statutes, sets down for that territory from Gustavus Schmidt's Laws of Spain and Mexico, articles 36–69, 482, 483, published in New Orleans, 1851. In Louisiana, as in France, the spouses may on their marriage adopt the dotal régime instead of the "communaute," or that of "separation of goods," which differs from it still more; but, when community is entered on, its principles are carried out much more fully and consistently than in the other states, in which this exotic plant has been rather roughly treated by Anglo-American lawmakers and judges. That the subject is growing to be an important branch of American law is shown by the table of 1073 cases (about 400 of them from Louisiana) which is appended to Judge Ballinger's treatise.

The states of Louisiana, Texas, California, Nevada, Washington, and Idaho, the territories of Arizona and New Mexico (?) have bor-

¹⁷⁵ Mississippi, Code, § 1876; *McReary v. Robinson*, 12 Smedes & M. 318; *Edwards v. McGee*, 27 Miss. 92; *Womack v. Boyd*, 31 Miss. 443. Nonresidents not within statute, *Barber v. Ellis*, 68 Miss. 172, 8 South. 390.

¹⁷⁶ Illinois, Rev. St. c. 3, §§ 74–77; *Marshall v. Rose*, 86 Ill. 374. In chapter on "Valid Judgment," § 150 ("administrator's license"), statutes in several states are referred to in which sales by license are allowed for the widow's award or family allowance, with or without other debts of the estate.

rowed from the Spanish law (Louisiana in part from the French law) the "community of property" between husband and wife, a sort of partnership, into which each of them brings—First, what he or she has at marriage; secondly, what comes to him or her afterwards by gift, legacy (or devise), and descent; and all this remains the separate property of each, while whatever is "acquired" during the marriage is supposed to be earned by the joint labor of both. When the marriage is dissolved by death or divorce, the acquisitions or "acquests" forming the "community" property are disposed of according to special laws of descent, on the basis of each spouse being the owner of one-half of the common property after the payment of the debts and other charges against it.¹⁷⁷

Leaving out of account Louisiana, where the provisions of the statute go into great detail,¹⁷⁸ and are taken to a great extent from the "Code Civil" of France, we shall find that in the other states the symmetry of this partnership has been somewhat broken in upon by the tenderness of lawmakers and courts for the wife, which have secured her her earnings as separate property, but much more by a deviation from the French model, under which "all the fruits, income, interest, and arrears of every nature whatever, falling in or received during marriage, and issuing from the estate belonging to the husband or wife at the time of its celebration, or from the estate coming to either since the marriage," belong to the community.¹⁷⁹

¹⁷⁷ California, Civ. Code, §§ 162, 163 (defining "separate property"), § 164 (defining community property), § 687 (but a repetition of § 164). Texas, art. 2968 (2183); Nevada, §§ 499 (separate) to 509; Washington, §§ 1397–1407; Idaho, § 2494 and following.—are taken literally from California Civil Code, § 164, etc. The Washington statute was first enacted in 1881, and is not retrospective. Arizona Territorial, §§ 2100–2109, 2611–2617, 2071–2074, 2076. See *infra* as to New Mexico.

¹⁷⁸ Louisiana, Civ. Code, arts. 2383–2391, treat of paraphernal property; arts. 2337–2382, of dowry, which is the wife's separate property when the marriage is under the "dotal régime," not under that of community; arts. 2399–2424, of community, which is repeatedly called a "partnership" in the statute.

¹⁷⁹ The French "Code Civil" treats in a separate chapter "le régime de communaute," which is both in France and in Louisiana entered into as of course when parties marry without agreeing on another system, either the dotal or that of entire separation of goods. Articles 1401–1408 set out the assets, articles 1409–1420 the liabilities, of the community; articles 1421–1440 treat of its management; articles 1441–1452, of its dissolution; articles 1453–

On the contrary, in the American states, the laws of which we here treat, the separate property of the husband or wife draws to it either, as in Texas, "the increase of land" (formerly of land and slaves), or, as in the more western and northwestern states, "the rents, issues and profits thereof;" that is, of all separate property, including merchandise and money. Hence, the estates of husband and wife cannot be turned into or estimated in money, and be wound up like a partnership, crediting each side with the capital put in, and dividing the residue into two equal parts, as is often done in France and other countries living under the Code Civil.¹⁸⁰ The presumption that property bought during the marriage is common property may, between the parties, and purchasers with notice, or volunteers, be rebutted by proof of the source of the purchase money.¹⁸¹

In the states other than Texas, even the profits of mercantile business have been made to follow the capital furnished by husband or

1481, of the rights of widow and heirs after dissolution; articles 1482-1491, of the settlement of the community debts. The statutory provisions in Texas, California, etc., are few and short. The Spanish law, formerly in force in California, was even broader than the French in defining what property is ganancial (i. e. gained, acquired). *Panaud v. Jones*, 1 Cal. 488, and Paschal's notes in the Statute Digest of Texas (1875) under article 4641.

¹⁸⁰ The annotators of the California Code, quoting Prof. Pomeroy, admit that it is hard to tell what is meant by "rents, issues, and profits." The results of the farming of the wife's land were held profit so as to become part of the wife's separate property. *Lewis v. Johns*, 24 Cal. 98. And so of the husband's land. *Estate of Higgins*, 65 Cal. 407. So land purchased during coverture with separate funds is separate property. *Ramsdell v. Fuller*, 28 Cal. 37. And if the wife, with her separate funds, buy land from the husband, it will be separate. *Hussey v. Castle*, 41 Cal. 239. The intent in a deed of gift is immaterial; the result is separate property. *Stockstill v. Bart*, 47 Fed. 231. The Arizona statutes define most compactly the separate property as embracing the "increase, rents, issues, and profits of the same." The earnings and accumulations of the wife and of her minor children while she lives separate from her husband are her separate property. All property acquired during marriage, except by gift, devise, or descent, or as above, is "common." Idaho includes "rents and profits" of the separate property with it, and provides for deeds to the wife by which property may, even after marriage, be secured to her separate use, excluding the husband from control, etc., as with separate estate in equity. Earnings of wife when living apart are also separate.

¹⁸¹ *Smith v. Boquet*, 27 Tex. 512, and cases below *passim*.

wife, becoming, like it, separate property, and giving the same character to land in which either capital or profits, or both, were afterwards invested; and, where profits were made partly on separate and partly on common property, they would take the like character in proportion, and impart it in like proportion, to the final investment.¹⁸² But, where the proportions cannot be traced or shown, the presumption in favor of community property must prevail.¹⁸³

In Texas it is now settled that where a mercantile business is started with the capital of either wife or husband the profits are community property, and subject to community debts.¹⁸⁴ So, of course, are all earnings in the professions or employments, and, though a woman can collect or sue for her own wages, the investment of those wages would probably be treated as common property; also such profits in the acquisition of land as pay for a tract of land by the resale of a part.¹⁸⁵

Damages recovered for injury to the body or feelings of either husband or wife are community property, as they cannot be traced back to the separate capital of either.¹⁸⁶ Lastly come grants of land made to either husband or wife during their marriage, in consideration of, or to induce, settlement, or by the United States as mining claims;¹⁸⁷ while land granted in consideration of services performed before marriage would of course belong to him who had given them while unmarried, as his separate property.¹⁸⁸

¹⁸² *In re Bauer's Estate*, 79 Cal. 304, 21 Pac. 759.

¹⁸³ *Schuyler v. Broughton*, 70 Cal. 282, 11 Pac. 719.

¹⁸⁴ *Smith v. Bailey*, 66 Tex. 553, 1 S. W. 627; *Middlebrook Bros. v. Zapp*, 73 Tex. 29, 10 S. W. 732; *Claflin v. Pfeiffer*, 76 Tex. 469, 13 S. W. 483, and other cases there quoted.

¹⁸⁵ *Yesler v. Hochstettler*, 4 Wash. 349, 30 Pac. 398. So, again, by a compromise of a bad land title. *Duncan v. Bickford*, 83 Tex. 322, 18 S. W. 598. But where there is a separate title, subject to vendor's lien, a change into common property by payment of purchase money is not favored. *McDougal v. Bradford*, 80 Tex. 558, 16 S. W. 619; *Lake v. Bender*, 18 Nev. 361, 4 Pac. 711, and 7 Pac. 74 (profits from use of hotel, ranch, and toll road belonging to husband are separate).

¹⁸⁶ *Loper v. Telegraph Co.*, 70 Tex. 689, 8 S. W. 600; *McFadden v. Railway Co.*, 87 Cal. 467, 25 Pac. 681; *Neale v. Depot Ry. Co.*, 94 Cal. 425, 29 Pac. 954.

¹⁸⁷ *Mills v. Brown*, 69 Tex. 244, 6 S. W. 612; *Hensel v. Kegans*, 79 Tex. 347, 15 S. W. 275; *Jacobson v. Bunker Hill & S. Mining & Concentrating Co.*, 2 Idaho, 863, 28 Pac. 396.

¹⁸⁸ *Parker v. Newberry*, 83 Tex. 428, 18 S. W. 815. But proof must be made
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All these sources of earnings are material for our purpose, for money coming from any of them may be turned at last into land, and the character of common or separate, once taken, runs through all subsequent changes and exchanges.¹⁸⁹ Thus, the title of land must often depend on facts outside of the record, which can only be shown by word of mouth.¹⁹⁰

Lately it has been held in Texas, against the former opinion held by bar and bench, that the right of the community is a mere equity, the legal title being in the husband or wife in whose name the deed runs (and this is the plain reading of the statutes in Washington);¹⁹¹ and a purchaser from the husband who buys for value and without notice of its origin from the wife's estate what appears to be community property, i. e. such as, after marriage, has been conveyed to either husband or wife, has always been protected.¹⁹²

The presumption in all those cases is on the side of the community (or at least it was so, until California upset the harmony and

that the services preceded marriage. *Nixon v. Wichita Land & Cattle Co.*, 84 Tex. 408, 19 S. W. 560. (See, for peculiar grant, *Kircher v. Murray* [Tex.] 54 Fed. 617). Hence, if the wife dies after long occupation of public lands, and title is taken afterwards, it is the husband's separate property. *Labish v. Hardy*, 77 Cal. 327, 19 Pac. 531.

¹⁸⁹ *Mitchell v. Mitchell*, 80 Tex. 101, 15 S. W. 705 (deed in husband's name, wife's separate property); *In re Bauer's Estate*, 79 Cal. 314, 21 Pac. 754; *Love v. Robinson*, 7 Tex. 6 (exchange); *McIntyre v. Chappell*, 4 Tex. 187 (same). But, when separate property goes through mutations, the trace must be clear. *Dimmick v. Dimmick*, 95 Cal. 323, 30 Pac. 547. The husband was, however, held estopped by a recital in a power of attorney which had not been acted on. *Yesler v. Hochstettler*, 4 Wash. 349, 30 Pac. 398.

¹⁹⁰ *Dunham v. Chatham*, 21 Tex. 231 (proof to show the origin of the purchase money; proof to show whether a gift was intended); *Tolman v. Smith*, 85 Cal. 280, 24 Pac. 748 (recitals in deed not binding on creditors).

¹⁹¹ *Patty v. Middleton*, 82 Tex. 586, 17 S. W. 909 (overruling *Yancy v. Batte*, 48 Tex. 46), and *Hensley v. Lewis* (1891) 82 Tex. 595, 17 S. W. 913. So, also, in Washington, the legal title is held to follow the deed. *Sadler v. Niesz*, 5 Wash. 182, 31 Pac. 630, 1030. In Washington, the wife, as trustee for another, can convey. *Stockstill v. Bart*, 47 Fed. 231. The Washington statutes, §§ 1448-1451, enable the wife, by recording her claims to separate property, to protect herself against creditors of or purchasers from the husband.

¹⁹² See next section. The dispute generally arises between a purchaser and the wife's heirs.

underlying spirit of the system by an act of 1893, raising the presumption that a conveyance to the wife alone is meant to give her a separate property, and one to her and her husband a tenancy in common);¹⁹³ and this presumption is said to be not only a rule of evidence, but a rule of property; so that an act in California, passed in 1889, by which a deed to the wife raises the presumption of separate property in her, and a deed to husband and wife the presumption of tenancy in common, cannot work retrospectively on lands conveyed to the wife before its date.¹⁹⁴ The Washington statute says expressly that it is not retrospective; but its main features date back to 1879 and even to 1869, and few estates will escape its effect.¹⁹⁵ Generally speaking, women not commorant in the state are entitled to their rights of community, even where residence is required, for the domicile of the husband is also that of the wife; but where a woman has never followed her husband into the state, and has never been known, she is estopped after a lapse of many (say 20) years from appearing on the scene and claiming, against a purchaser in good faith, her half of the purchased lands.¹⁹⁶ For the management of the community property is placed wholly in the hands of the husband, who can sell, convey, and incumber it; while in Washington, this power is restricted so that the real estate of the community can be conveyed or incumbered only by the husband and wife both signing and acknowledging a joint deed.¹⁹⁷

¹⁹³ Smith v. Boquet, 27 Tex. 507; Morgan v. Lones, 78 Cal. 58, 20 Pac. 248; Lemon v. Waterman, 2 Wash. T. 485, 7 Pac. 899; Schuyler v. Broughton, 70 Cal. 282, 11 Pac. 719. The presumption is not changed by a bond for title (without payment) before marriage. Hawley v. Geer (Tex. Sup.) 17 S. W. 914. See act Cal. March 3, 1893, amending Civ. Code, § 164.

¹⁹⁴ Jordan v. Fay, 98 Cal. 264, 33 Pac. 95, relying on Schuyler v. Broughton, supra.

¹⁹⁵ Washington, Gen. St. § 1407.

¹⁹⁶ Jacobson v. Bunker Hill & S. Mining & Concentrating Co., 2 Idaho, 863, 28 Pac. 396. Contra, Nuhn v. Miller, 5 Wash. 405, 31 Pac. 1031, and 34 Pac. 152. The Washington act of 1879 applies to nonresidents. Gratton v. Weber, 47 Fed. 852. Not so the act of 1869. Hershberger v. Blewett, 46 Fed. 707. But where a married man or a married woman from another state brings money or personalty, which by the law of that state is his or hers as separate property, into a community state, and buys land there, the land also is separate. Kraemer v. Kraemer, 52 Cal. 302; Freeburger v. Gazzam, 5 Wash. 772, 32 Pac. 732.

¹⁹⁷ California, Civ. Code, § 172; Washington, part of section 1400. Sections
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The common property may be taken in execution for the debts of the community, which are variously defined. In California the debts incurred by the wife before marriage are considered such; those incurred after marriage, only when the husband joins in a pledge (i. e. if he makes them his own debt). In Texas the wife's debts incurred for necessaries are made a charge against this property.¹⁹⁸ But while in these states it can be taken for all debts of the husband, it has been held in Washington that his liability for some torts (e. g. malfeasance as an officer) or on a debt by suretyship is not a community debt.¹⁹⁹ Where a judgment against the husband becomes a lien on the community lands, the wife can have this lien removed, if there was no valid debt; the burden being on her to show that there was none.²⁰⁰

When the husband abandons his wife she becomes the head of the family, and can sell the community property either to pay community debts or, when it becomes necessary, for the support of herself and children.²⁰¹ And, while the husband may make moderate

1448-1451 of Washington Statutes provide a means for husband or wife to warn purchasers against buying property from one or the other by a notice on record. These sections were enacted in 1891. In this state the husband cannot, without joining with his wife, contract to sell community land, or even give a lease. *Holyoke v. Jackson*, 3 Wash. Ter. 235, 3 Pac. 841; *Hoover v. Chambers*, 3 Wash. Ter. 26, 13 Pac. 547; *Brotton v. Langert*, 1 Wash. St. 227, 23 Pac. 688. Husband adding wife's name to conveyance of community lands immaterial in Texas. *Hardin v. Sparks*, 70 Tex. 429, 7 S. W. 769.

¹⁹⁸ California, Civ. Code, § 167; Texas, Rev. St. art. 2970. Liable to ordinary debts of husband, *Adams v. Knowlton*, 22 Cal. 283; *In re Tompkins' Estate*, 12 Cal. 114; antenuptial debts of wife, *Van Moren v. Johnson*, 15 Cal. 308; *Vlautin v. Bumpas*, 35 Cal. 214; liable, under the Washington statute, to mechanics' liens, but the wife must be made a party to suit for enforcement, *Sagmeister v. Foss*, 4 Wash. 320, 30 Pac. 80, 744; deed to wife after marriage is *prima facie* proof for purchaser under execution against husband, *King v. Holden* (Tex. Sup.) 16 S. W. 898; but see above as to California act of 1889.

¹⁹⁹ *Brotton v. Langert*, 1 Wash. St. 73, 23 Pac. 638; *Columbia National Bank v. Embree*, 2 Wash. St. 331, 26 Pac. 257.

²⁰⁰ *Andrews v. Andrews*, 3 Wash. Ter. 286, 14 Pac. 68.

²⁰¹ *Wright v. Hays*, 10 Tex. 130 (worked out by the court without help from the statute); *Fullerton v. Doyle*, 18 Tex. 3. But living separate is not necessarily an abandonment. *Jacobson v. Bunker Hill & S Mining & Concentrating Co.*, *supra*.

gifts, he cannot put the community property out of his hands in fraud of his wife; for instance, by giving it to the children by a first marriage, thus doing *inter vivos* what he cannot do by will.²⁰² The husband can, during coverture, make gifts to his wife (as long as he does not commit a fraud thereby on antecedent creditors) by investing his own funds or those of the community in lands of which he puts the title in her sole name; and these, coming to her by gift, would be her separate property.²⁰³ In fact, his intention to make such lands separate property would be indicated by such action.²⁰⁴

In any of these states the parties to the marriage can, by written contract made before (in California and Washington also after) marriage, reserve their rights to their separate properties, just as in common-law states it may be done by marriage settlement or jointure.²⁰⁵ But when a wife sells out her rights in the community to the husband for a clearly inadequate price (quære whether in Texas she can do so at all) the act will be treated as a fraud on her rights, and void.²⁰⁶

The choice of homestead among the lands of husband, wife, or community will be discussed in the chapter on "Homestead."

§ 112. Dissolution of the Community.

The community between husband and wife is dissolved by the death of either, or by divorce. The "community" states have ei-

²⁰² *Lord v. Hough*, 43 Cal. 531; *Morrison v. Bowman*, 29 Cal. 337 (arguendo); *Rose v. Houston*, 11 Tex. 324 (gifts in fraud of wife avoided against purchaser with notice; but this seems to have been a case of her separate property, by tracing the consideration); *Smith v. Smith*, 12 Cal. 217. The cases in other states as to fraud on marital rights might be referred to.

²⁰³ *McKenny v. Nunn*, 82 Tex. 44, 17 S. W. 516; *Smith v. Boquet*, 27 Tex. 507 (fraud on creditor).

²⁰⁴ But where husband builds on lands bought in wife's name with his own separate funds, he may claim reimbursement. *Smith v. Strahan*, 16 Tex. 314, 25 Tex. 105; *Furrh v. Winston*, 66 Tex. 521, 1 S. W. 527.

²⁰⁵ California, Civ. Code, § 178; Washington, St. 1401 (agreement before or after marriage); *Calhoun v. Leary*, 6 Wash. 17, 32 Pac. 1070; *Carter v. McQuade*, 83 Cal. 274, 23 Pac. 348; *Jackson v. Torrence*, 83 Cal. 521, 23 Pac. 695.

²⁰⁶ *Proetzel v. Schroeder*, 83 Tex. 684, 19 S. W. 262.

ther abolished or have never known courtesy and dower. The rights of the survivor in the common property take the place of one and the other.²⁰⁷ The husband has, in all these states, the power, when he dies first, to dispose by will of his half of the common property. The wife has the same power in Texas and Washington. But the husband cannot pass by his will the wife's half, any more than he can, in the common-law states, devise away her dower;²⁰⁸ and this is so plain that the will is not construed as being so intended unless such meaning is very clearly expressed.²⁰⁹ The wife can, in California, if she dies first, dispose by will only of such parts of the common property as may have been set aside to her by judicial decree. If none is so set aside to her, or if she makes no will, the whole common property goes to the husband (and such is also the statute in Nevada and Idaho); and the husband controls the whole without taking administration, like a surviving partner, and has power to convey the community lands.²¹⁰

In Texas, Arizona, and Washington, the husband and wife are put upon an equality. If either of them dies first, and the community is thus dissolved, the law distinguishes two cases: If the one who dies first leaves no "child or children" (such is the language in Texas and Arizona), or no descendants, the whole community property goes to the survivor, subject to the community debts, without administration. If there is a child or children, or descendants, they take the decedent's part, and the survivor keeps his or her own, each subject to half the debts, allowances, and expenses of administration. In Washington, a wife who dies first, as well as the husband, is authorized to make a will of her half.²¹¹

²⁰⁷ The denial of courtesy and dower is found in most of the statutes among the sections on "Community Property."

²⁰⁸ So held in California before the statute limited the husband's power of disposition by express words. *Beard v. Knox*, 5 Cal. 252; *Jewell v. Jewell*, 28 Cal. 232.

²⁰⁹ *Estate of Silvey*, 42 Cal. 210. See sections of this work on "Election."

²¹⁰ California, Civ. Code, § 1401. It was otherwise under the act of 1850. While that was in force, her descendants took her half. *Payne v. Payne*, 18 Cal. 291. If she had none, all even then went to the husband. The present law is enforced in *Moore v. Jones*, 63 Cal. 12.

²¹¹ Texas, Code, art. 2183 et seq.; Washington, § 1481; Arizona, §§ 1467, 1468; *Moody v. Smoot*, 78 Tex. 119, 14 S. W. 285 (subject to equitable control of court); *Meyer v. Opperman*, 76 Tex. 105, 13 S. W. 174. As to sharing of debts,

In California, Idaho, and Nevada, while the husband in all cases takes the half of the predeceased wife, the husband's share, if he dies first with issue, goes half to such issue, half to the wife. If there is no issue, she is to have her half, while the other is to be distributed (if he has made no will) like the separate property of the husband;²¹² which will, if literally carried out, give her a goodly share of this other half, as the wife is at least a coheir to the husband with collaterals and ascendants. But the latter provision has, in Nevada, been strangely misunderstood or disregarded, against the rights of the widow.²¹³

The Texas statute enables the widow to qualify as "survivor." This is a sort of administration, embracing real estate, and she can, as such survivor, convey the community lands, giving a legal title; but, under her oath and bond, she should do so only as far as it is necessary to pay the "family allowance," the debts of the community, and the expenses of administration. Her powers cease with her widowhood. There is nothing in the law to prevent her from paying in any order she pleases, and reimbursing herself first for her outlays; not, at least, before creditors have instituted an administration suit.²¹⁴ And even without qualifying, she can, while a widow, by deeds made in discharge of community debts, upon payment of money with which she discharges such debts, raise in her grantee an equitable title, which, to a value equal to the debts thus discharged, will be sustained against the husband's heirs.²¹⁵

The husband does not forfeit his rights in the community property, nor his power of disposing of either half after his wife's death

Johnston v. San Francisco Sav. Union, 75 Cal. 753, 16 Pac. 753. See, also, *Mayo v. Tudor's Heirs*, 74 Tex. 471, 12 S. W. 117.

²¹² California, Civ. Code, § 1402. See *Hart v. Robertson*, 21 Cal. 346; *Jewell v. Jewell*, 28 Cal. 232 (subject to debts); *Morrison v. Bowman*, 29 Cal. 337. Same rule under the Mexican law. *Scott v. Ward*, 13 Cal. 458; Idaho, St. §§ 5712, 5713.

²¹³ *Clark v. Clark*, 17 Nev. 124, 28 Pac. 238. See contra under old California statute. *Jewell v. Jewell*, supra.

²¹⁴ Texas, art. 2220 et seq.; *Leatherwood v. Arnold*, 66 Tex. 414, 1 S. W. 173.

²¹⁵ *Auerback v. Wylie*, 84 Tex. 615, 19 S. W. 856, and 20 S. W. 776; *Davis v. McCartney*, 64 Tex. 584. The qualification of the widow as survivor does not prove her marriage before acquisition of the land. *Roche v. Lovell*, 74 Tex. 191, 11 S. W. 1079.

(if such power belongs to him otherwise), by having abandoned her, and living away from her at her death.²¹⁶

The rights of the wife's heirs in her half of the community have been very much shaken in Texas by the decisions of 1891, already mentioned, lowering the rights of the community in property deeded to the husband into a mere equity, so that they cannot claim against a bona fide purchaser from the husband who holds the deed.²¹⁷

A decree of divorce makes an end to the community, so far that there can be no further common acquisitions nor subsequent losses through the creation of new community debts. The court which pronounces the decree in most cases fixes the rights of the parties in the community property, unless, indeed, they do so by consent. In the absence of such order of court, or consent, each party would take one-half, subject to one-half of the community debts.²¹⁸

Where the husband is divorced, and the public records show no division of the common property, a purchaser from the second wife, to whom he devises it (or, indeed, a purchaser without notice from him), is (in Texas) protected against the first wife, if the deed to the land was in the husband's name, in like manner as such a purchaser is against the heirs of the wife.²¹⁹

When husband and wife, upon a separation, even without a divorce, in good faith divide the community property, the division is binding upon the husband's creditors.²²⁰

When the husband has, during the life of the wife, made an executory contract for the sale or exchange of common lands, he can carry it into effect by giving his deed of conveyance after her death.²²¹ Where the surviving husband or wife has sold and con-

²¹⁶ Hensley v. Lewis, 82 Tex. 595, 17 S. W. 913.

²¹⁷ Hensley v. Lewis, 82 Tex. 595, 17 S. W. 913; Patty v. Middleton, 82 Tex. 586, 17 S. W. 909 (see preceding section, note 191); conversely where wife sold, Sanburn v. Schuler, 3 Tex. Civ. App. 629, 22 S. W. 119.

²¹⁸ This division in California is even. Kraemer v. Kraemer, 52 Cal. 303. When the court will, for fault of party, dispose of property otherwise, is beyond our range.

²¹⁹ Edwards v. Brown, 68 Tex. 329, 4 S. W. 380, and 5 S. W. 87. A precedent for cases in note 217.

²²⁰ Wells v. Stout, 9 Cal. 479; Dupre v. Rein, 56 How. Prac. 228.

²²¹ Garnett v. Jobe, 70 Tex. 696, 8 S. W. 505.

veyed the common lands, whether they stood in the survivor's name or not, it will be presumed, after a great lapse of time (though they be wild lands, not in adverse possession), that the sale was necessary for the discharge of community debts.²²²

NOTE.

The following abridgement from Schmidt's Abridgement of the Laws of Spain and Mexico (for which the writer is indebted to Judge Ballinger's treatise, already quoted) gives the groundwork on which the community law of the Far West is built, and was, till 1884, the law which governed the relation in New Mexico:

Art. 40. The husband exercises in his own name all the civil actions of the wife, administers all her property, enters into all contracts, accepts and renounces all inheritances, etc.

Art. 41. The wife cannot exercise any of the foregoing powers without the express authority of her husband, and should she do so her acts are void.

Art. 42. The judge has the power to grant to the wife authority to do all the foregoing acts, when the husband improperly withholds his consent, and in cases of the absence of the husband, when delay may be attended with danger.

Art. 43. The law recognizes a partnership between the husband and wife as to the property acquired during marriage, which exists until expressly renounced, etc.

Art. 44. To this community belong (1) all the property, of whatever nature, which the spouses acquire by their own labor and industry; (2) the fruits and income of the individual property of the husband and wife; (3) whatever the husband gains by the exercise of a profession or office, e. g. as judge, lawyer, or physician; (4) the gains from the money of spouses, although the capital is the separate property of one of them.

Art. 45. The property owned by either husband or wife before marriage does not belong to the community, nor the profits of the same already due, although collected after the marriage.

Art. 46. Property acquired by either after marriage by a gratuitous title, such as inheritance, donation, or bequest, does not belong to the community.

Art. 47. Nor does property acquired in exchange for the property belonging to one of them, nor that acquired by the produce of the sale of property belonging exclusively to one of the spouses.

Art. 48. Money expended in improving property belonging to one of the spouses belongs to the community, but gives the other no claims to the property itself.

Art. 50. Deteriorations of the private property of one of the spouses, without the fault of the husband, are considered as losses; and the debts of

²²² Hensel v. Kegans, 79 Tex. 347, 15 S. W. 275.

the community are (1) money borrowed by the husband; (2) rents and taxes to which the property of either spouse is liable; (3) the dower promised by husband to wife during marriage (explained in another part of Laws of Spain, etc.).

Art. 51. The husband alone administers the property of the conjugal partnership during the existence of the marriage, and he can sell and dispose of the same as he thinks proper, provided always he does so without the intention of injuring his wife.

Art. 52. This power, however, must be exercised in the lifetime of the husband, and gives him no power over the community property not his own by last will and testament.

Art. 53. A legacy (which includes land as well as goods) left by the husband to his wife does not diminish the share of the latter in the matrimonial gains.

Art. 54. The community is also responsible for donations made by the husband, if the same be moderate and bestowed on relations.

Art. 55. The husband is liable for deteriorations which happen through his fault to the property of his wife.

Art. 56. The community is dissolved (1) by the death of one of the spouses; (2) by the confiscation of the property of one of them; (3) by the separation from bed and board.

Art. 57. The dissolution by death takes effect from the moment of its occurrence, etc.

Art. 58. But a new community may be created between the heirs and the survivor if they continue to keep their property in common, but in such event the gains or losses are apportioned among each in proportion to his share.

Art. 59. (Confiscation.)

Art. 60. Separation from bed and board dissolves the community, when it is decreed by a competent tribunal.

Art. 61. When the community is dissolved, etc., either party has the right to proceed to the immediate settlement of the same.

Art. 62. (As to fruits of land "pending at the time.")

Art. 63. All property possessed by husband and wife is presumed to belong to the community, and is to be divided equally, unless it be proved to the contrary.

Art. 64. The wife may renounce the community, and by the renunciation she forfeits all claims to the gains and remains discharged from all the debts contracted, or losses sustained by her husband.

Art. 65. The wife may renounce the community before, during, and after the dissolution of the marriage.

Art. 66. This renunciation must be express, and is never presumed.

Art. 67. On the death of the wife, the surviving husband acquires the absolute ownership and full administration of one-half of the matrimonial gains, and can freely dispose of the same, as well by contract inter vivos as by testament, without being compelled to reserve any portion thereof for the children of the marriage, provided he does not deprive them of their lawful portion.

Art. 68. The wife loses her matrimonial gains in the following cases: (1) When she has been guilty of adultery; (2) when she has abandoned her husband without his consent; (3) when she has joined some religious sect and therein married or committed adultery.

Art. 69. The widow likewise forfeits her portion, etc., by leading a dissolute life.

Art. 482 authorizes a married woman, "if she exercises publicly some office or trade, to make contracts relating to either."

Art. 483 allows the wife's contracts, made without the husband's assent, to "become valid if the latter ratify them afterwards, either expressly or tacitly."

The partial revision of New Mexico statutes adopted in 1884 ignores the Spanish law of community altogether, and regulates the property rights of married women thus:

Sec. 1087. All property, real, personal, and mixed, and choses in action, owned by any married woman, or owned or held by any woman at the time of her marriage, shall continue to be her separate property notwithstanding such marriage; and any married woman, may, during coverture, receive, take, hold, use and enjoy property of any and every description, and all availss of her industry, free from any liability of her husband on account of his debts, as fully as if she were unmarried.

Sec. 1088. A married woman shall be bound by her contracts, and responsible for torts committed by her, and her property shall be liable for her debts and torts, to the same extent as if she were unmarried. Any married woman shall be capable of making any contract with the consent of her husband, either by parol or under seal, which she might make if unmarried, and shall be bound thereby; except that no conveyance or contract for the sale of real estate or of any interest therein by a married woman, or any mortgages on lands or leases shall be valid, unless her husband shall join with her in such conveyances, save as provided in section 1091: provided, that if her husband is an insane person, she may make such conveyance, mortgage, lease, or contract by joining therein with the guardian of such insane person; and no right to an estate by the courtesy shall attach as against a mortgage given by a married woman to secure the purchase money of the land so mortgaged. Edgar v. Baca, 1 N. M. 613.

Sec. 1089. No married woman shall be liable for any debts of her husband, nor shall any married man be liable for any debts or contracts of his wife, entered into either before or during coverture, except for necessaries furnished to the wife after marriage, where he would be liable at common law, but each shall be liable for necessaries furnished to the husband or family of the husband and wife. In relation to all subjects either the husband or wife may be constituted the agent or attorney in fact of the other, or contract each with the other as fully as if the relation of husband and wife did not exist. But in all cases where the rights of creditors or purchasers in good faith come in question the husband shall be held to have notice of the contracts and debts

of his wife, and the wife shall be held to have notice of the contracts and debts of her husband, as fully as if a party thereto.

Sec. 1090. (Refers to desertions by husband.)

Sec. 1091. Nothing in this act shall be construed to affect ante-nuptial contracts or settlements, nor to exempt a husband from liabilities for torts committed by his wife.

§ 113. Conveyance of the Homestead.

NOTE. The laws which define and admeasure the homestead, which say who is or is not entitled to its privileges, will be discussed in another chapter, in connection with proceedings for selling or otherwise subjecting land to the payment of debts. In the three following sections it is assumed that the land, or interest in land, dealt with by conveyance or incumbrance is what, under certain constitutional guaranties and legislative acts, made primarily to protect the homes of unfortunate debtors against compulsory sale, is known as the homestead or the homestead right. Hence, the question whether a conveyance or mortgage, without the assent of the grantor's wife, is good under the homestead law, will not be discussed in the next following sections, when it depends on the preliminary question whether the interest conveyed or incumbered is one covered by the homestead law of the state.

The most numerous class of land owners are those who have only one farm, or one house and lot, which serves them for a dwelling. The statutory homestead has therefore come within late years more and more to occupy the place which dower and quarantine held at the common law, in securing the owner's widow and children from immediate want after his death. Like dower, the homestead or the homestead right cannot be aliened or barred in many of the states without the wife's assent, shown by her joining in the deed for that purpose; and, if the homestead belongs to the wife, the husband must join, though she have the power to sell other lands without his co-operation. But, unlike a deed in which the dower or courtesy are not released, the conveyance or incumbrance of a homestead is ineffectual unless the wife (or husband) has joined, even during the life of the owner, as well as after his or her death.

In Michigan, Kansas, and Nevada, and in North Carolina, Georgia, Tennessee, Texas, Alabama, and Florida, the state constitution itself secures the homestead (in North Carolina only when it has been selected, or when judgments have been docketed) against an alienation or incumbrance by the husband without the assent (or

voluntary assent) of his wife. Some of these constitutions also forbid the wife to alien or incumber her homestead without the assent of the husband.²²³

In Texas and Louisiana, even with the assent of husband and wife, "no mortgage, deed of trust, or other lien on the homestead," except for purchase money or improvements, "and no pretended sale of the homestead involving any condition or defeasance" is valid. Under this last clause deeds absolute on their face have been held void upon a showing déhors that the sale was in the intent of the parties only a mortgage in disguise;²²⁴ while in Georgia, the home-

²²³ Michigan, Const. art. 16, § 2 ("but such mortgage or other alienation of such land by the owner—if a married man—shall not be valid without the signature of the wife"); Kansas, Const. art. 15, § 9 (consent of wife); Tennessee, Const. art. 11, § 11 ("nor shall said property be alienated or any interest granted without the joint consent of husband and wife, when that relation exists"); Nevada, art. 4, § 30 (only as to homestead of which there is a recorded declaration, *Child v. Singleton*, 15 Nev. 461); Alabama, art. 10, § 2 ("without the voluntary signature of the wife"); North Carolina, art. 10, § 8 (to same effect. See below as to meaning of "voluntary"); Florida, art. 10, § 1. These constitutional provisions are self-executing. *Miller v. Marx*, 55 Ala. 322; *Adrian v. Shaw*, 82 N. C. 474. Sole deed good when no judgments are docketed. *Dixon v. Robbins*, 114 N. C. 102, 19 S. E. 239, referring to *Williams v. Kerr*, 113 N. C. 306, 18 S. E. 501, and *Ferebee v. Hinton*, 102 N. C. 99, 8 S. E. 922. In North Carolina, the homestead must be allotted by an order of the court before it is claimed; but the head of a family against whom judgments are rendered has time then to claim it, and it will also then be protected from his sole mortgage. *Flemming v. Graham*, 110 N. C. 374, 14 S. E. 922. In Tennessee, no homestead right can exist in an undivided half. *Avans v. Everett*, 3 Lea, 76; *J. I. Case Co. v. Joyce*, 89 Tenn. 337, 16 S. E. 147.

²²⁴ Texas, Const. art. 16, § 50; Louisiana, Const. art. 222 (no waiver of homestead is valid). But in *Hensel v. International Bldg. & Loan Ass'n*, 85 Tex. 215, 20 S. W. 116, a mortgage made to pay off older liens was held good pro tanto. Conveyance and reconveyance on terms construed into a mortgage and held void, *O'Shaughnessy v. Moore*, 73 Tex. 108, 11 S. W. 153; *Hays v. Hays*, 66 Tex. 606, 1 S. W. 895 (parol evidence allowed to show it); *Ullman v. Jasper*, 70 Tex. 446, 7 S. W. 763; *Hurt v. Cooper*, 63 Tex. 362,—running back to *Gibbs v. Penny*, 43 Tex. 563. Land prepared in part and intended for a homestead can be mortgaged by husband and wife, *Kempner v. Comer*, 73 Tex. 196, 11 S. W. 194; *McLean v. Ellis*, 79 Tex. 398, 15 S. W. 394 (as to unmarried head of family). For a sale held to be real, though there was an agreement for resale, see *Astugueville v. Loustaunau*, 61 Tex. 233, and *Hardie v. Campbell*, 63 Tex. 292.

stead, when selected of record, cannot be mortgaged at all, and can be sold only upon the order of a superior court.²²⁵

This concurrence of husband and wife is in other states required by statute, mortgages for purchase money being excepted in most of them. Thus, the laws of Wisconsin and Minnesota require the signature of the wife, "if the owner be a married man." The requirement in New Hampshire is reciprocal ("owner and wife or husband"). In Massachusetts there must be "no conveyance, unless by deed in which the wife of the owner joins"; in Iowa "unless the husband or wife, if the owner is married, concur in the same instrument"; in Illinois "no release or conveyance, unless [it be] subscribed by the householder and wife or husband, or unless possession be given in pursuance of a grant"; in Nebraska unless the instrument is executed and acknowledged by both husband and wife. In the Dakotas husband and wife must join if both are residents. In Mississippi the wife, if living with the husband, must join in his deed, the husband, if living with the wife, in hers. In Missouri, if the owner's wife has filed a statutory homestead claim in the recorder's office, so as to put purchasers on notice, the husband cannot alien or incumber without her. In Wyoming the wife must join in the sale or incumbrance, upon privy examination, which is not used otherwise. In California (when the homestead has been formally selected) the deed must be "executed and acknowledged by both husband and wife," and the homestead, if the claimant be mar-

²²⁵ Under the Georgia constitution of 1868 (forbidding sale except for purchase money, etc.), there could be no sale, even by order of court. *Roberts v. Trammell* (1875) 55 Ga. 383, remedied as to old homestead by clause in constitution of 1877, made section 5218 of Code. Article 9, § 3, of new constitution authorizes sale by order of court. Under this clause the owning husband cannot sell otherwise as long as wife lives and any child is under age. Conveyance by married parties without leave void. *Timothy v. Chambers*, 85 Ga. 267, 11 S. E. 598. The waiver by the owner while unmarried binds him and family when married, *Broach v. Powell*, 79 Ga. 79, 3 S. E. 763. Even under the constitution of 1868, the homestead might be validly conveyed in consideration of a debt superior to it. *Gunn v. Wades*, 65 Ga. 537. For effects of sale directed by a court where the purchaser bought in good faith under Const. art. 9, § 8, see *Bonds v. Strickland*, 60 Ga. 624, and *Brown v. Driggers*, 62 Ga. 354.

ried, can only be abandoned by both. In Montana it is very much as in Michigan, Wisconsin, etc.²²⁶

In Connecticut a "release" of the homestead is to be executed by husband and wife jointly, in the same manner as a deed is executed for record. This would seem to mean an instrument by which it is waived as against a named debt, such as a mortgage waiving the homestead right, but could hardly be understood to embrace an out and out sale.²²⁷

In Kentucky the husband owning a homestead can sell it without the wife's consent, leaving it subject to her dower only, and so he can sell it in Colorado; but a mortgage, which is here coupled with a release or waiver of the homestead, must be signed by both husband and wife (in Colorado if she occupies it with him), acknowledged by them, and actually lodged for record before it can be enforced.²²⁸

In Washington a grant or mortgage by the husband alone is good against him, but not as against the wife when she has not joined.²²⁹

In the absence of a statute (as in South Carolina), or when the case does not come within the words of the statute, as in Missouri, when the wife of the owner has not filed her formal claim in the

²²⁶ Wisconsin, § 2203 (acknowledgment by wife not necessary, Godfrey v. Thornton, 46 Wis. 677, 1 N. W. 362, overruling earlier decisions); Minnesota, c. 68, § 2 (both in words quoted in note 223 from Michigan constitution); New Hampshire, c. 138, §§ 2, 3; Massachusetts, c. 123, § 7; Iowa, § 1990; Illinois, c. 52, §§ 4, 8; Nebraska, § 1964 (as to necessity of acknowledgments, see Aultman & Taylor Co. v. Jenkins, 19 Neb. 209, 27 N. W. 117, held constitutional against objections to title in Bonorden v. Kriz, 13 Neb. 121, 12 N. W. 831); Dakota, Pol. Code, c. 38, § 3; California, Civ. Code, §§ 1241, 1244; Missouri, § 5435; Wyoming, § 2784 (see chapter 5, § 53); Mississippi, Code, §§ 1983, 1984, under section 94 of the constitution; Montana, Code Proc. § 323. A mortgage by husband and wife is valid in these states. Kopp v. Blessing, 121 Mo. 391, 25 S. W. 757.

²²⁷ Connecticut, Gen. St. § 2783, from an act of 1887.

²²⁸ Kentucky, St. 1894, § 1706 (a general assignment for creditors is a mortgage, and must be signed by the wife, Hemphill v. Haas, 88 Ky. 492, 11 S. W. 510); Colorado, § 1636 (Wright v. Whitlick, 18 Colo. 54, 31 Pac. 490); Brane v. Craig, 12 Bush (Ky.) 404 (absolute deed good). Absolute deed intended for a mortgage needs a wife's assent. Hayden v. Robinson, 83 Ky. 615.

²²⁹ Washington, Code Proc. § 483.

recorder's office, the owner's power to alien or incumber is not abridged, though the statute may (and it always does) reserve some rights to widow and minor children after the owner's death.²³⁰ Wherever the homestead is by statute limited in value, so that this limit in money is set aside to the owner out of a homestead worth more, the sale or incumbrance without the required assent is good for the surplus over this limit.²³¹

In the absence of express words in the statute, a grant or incumbrance of the land generally, in which husband and wife join, is good. The homestead need not be specially mentioned, and to mortgage the "homestead right," which would mean the limited value, is rather hurtful. And there may be other words in the deed or acknowledgment which narrow its effect; as if the wife only releases dower, or is made to acknowledge only her release of dower.²³²

²³⁰ Elliott v. Mackorell, 19 S. C. 242; Chalmers v. Turnipseed, 21 S. C. 136; Watson v. Neal, 38 S. C. 90, 16 S. E. 833; Greer v. Major, 114 Mo. 145, 21 S. W. 481 (overruling dicta in previous cases; and this though the contrary effect might have been inferred from the statutes); s. p., Tucker v. Wells, 111 Mo. 399, 20 S. W. 114; Smith v. Mallone, 10 S. C. 39 (no restrictions).

²³¹ McTaggart v. Smith, 14 Bush (Ky.) 414; Barrows v. Barrows, 138 Ill. 649, 28 N. E. 983 (if the homestead at the time of the conveyance was worth more than the limit); Watson v. Doyle, 130 Ill. 415, 22 N. E. 613 (contract for sale of dwelling house enforced, vendee being willing to take it subject to the \$1,000 homestead right); Hildebrand v. Taylor, 6 Lea (Tenn.) 659 (see as to the estoppel of the wife by her subsequent joinder in mortgage of homestead); Farley v. Whitehead, 63 Ala. 295. But see, contra, Goodrich v. Brown, 63 Iowa, 247, 18 N. W. 893 (husband alone not to mortgage any part of home tract, though beyond legal area).

²³² Wing v. Hayden, 10 Bush (Ky.) 276 (plain deed); Daly v. Willis, 5 Lea (Tenn.) 100 ("in fee"); Lover v. Bessenger, 9 Baxt. (Tenn.) 393; Van Sickles v. Town, 53 Iowa, 259, 5 N. W. 148 (land not described as being the homestead). A mortgage of the "homestead exemption" is a mere release, and gives no prior lien on the land against creditors having the right to disregard it, Gaines v. Casey, 10 Bush (Ky.) 92; "release of dower" bad, Hayden v. Robinson, 83 Ky. 615; Long v. Mostyn, 65 Ala. 543; Wilson v. Christopherson, 53 Iowa, 481, 5 N. W. 687; Pipkin v. Williams, 57 Ark. 242, 21 S. W. 433; Thompson v. Sheppard, 85 Ala. 611, 5 South. 334; Davis v. Jenkins, 93 Ky. 353, 20 S. W. 283 (wife not joining in granting clause, but releasing dower and homestead, good); Hawkins v. Pugh, 91 Ky. 522, 16 S. W. 277 ("the undersigned mortgagors"—both sign—is good); Yocum v. Lovell, 111 Ill. 212 (where the wife's name did not appear in the body of the deed, but connected itself with a clause therein). A verbal assent is nowhere sufficient. Collins v. Boyett,

But in Illinois, where the conveyance or incumbrance is coupled in the statute with a release of the homestead, it is held that no instrument affecting it, whether executed or executory, has any effect, unless the homestead right be expressly named, and unless, further, the instrument be acknowledged in the manner in which deeds are acknowledged, and this right be expressly referred to in the acknowledgment. But here and in Iowa the delivery of possession, which amounts to an abandonment of the homestead, cures all defects.²³³

Husband and wife must join in the same instrument. If the owner has made a void conveyance, his wife cannot afterwards, by signing another deed, impose upon her husband the effects of a valid deed, without his consent.²³⁴ But it seems that when husband and wife join in an absolute deed of the homestead, with the understanding that it shall be turned into a mortgage, the wife, leaving to the husband to agree upon the defeasance, is bound by its terms.²³⁵

87 Tenn. 334, 10 S. W. 512 (but see *infra*, note 250). An assent by signature is good, though it does not amount to a conveyance, under constitution of Alabama, *Dooley v. Villalonga*, 61 Ala. 129; not good in Massachusetts, *Greenough v. Turner*, 11 Gray, 332; *Kopp v. Blessing*, 121 Mo. 391, 25 S. W. 757.

²³³ *Stodalka v. Novotny*, 144 Ill. 125, 33 N. E. 534; *Black v. Lusk*, 69 Ill. 70; *Redfern v. Redfern*, 38 Ill. 509; *Eldridge v. Pierce*, 90 Ill. 474 (where a later mortgage to another in good form was preferred); *Gage v. Wheeler*, 129 Ill. 197, 21 N. E. 1075 (officer did not certify to knowing the grantor); but in *Maxwell v. Maxwell*, 145 Ill. 156, 34 N. E. 145, possession given under section 8 of the homestead act cured the flaw. So it did in Iowa, *Drake v. Painter*, 77 Iowa, 731, 42 N. W. 526; *Winkleman v. Winkleman*, 79 Iowa, 319, 44 N. W. 556; and in Kansas, where the wife voluntarily moved to another homestead, *McAlpine v. Powell*, 44 Kan. 411, 24 Pac. 353. A mortgage to the school fund on its ordinary blank, without more, is ineffectual. *Trustees v. Beale*, 98 Ill. 248.

²³⁴ *Duncan v. Moore*, 67 Miss. 136, 7 South. 221 (mere delay in signing, even for years, but before recording, not fatal); *Howes v. Burt*, 130 Mass. 368; *Richardson v. Woodstock Iron Co.*, 90 Ala. 266, 8 South. 7 (wife acknowledging after husband's death too late); *Smith v. Pearce*, 85 Ala. 264, 4 South. 616 (where a third person had acquired rights through the voidness of the deed). But in Kansas, if the wife at the time consents in fact, she can give her written separate assent later; say by quitclaim deed. *Dudley v. Shaw*, 44 Kan. 683, 24 Pac. 1114. *Contra*, *Ott v. Sprague*, 27 Kan. 620, where the wife had not consented at the time of conveyance.

²³⁵ *Jarvis v. Fox*, 90 Mich. 67, 51 N. W. 272.

It has been held in Mississippi, where the statute does not exempt mortgages for the purchase money from the rule requiring the wife's assent, that they are exempt from it, in analogy to the common-law rule as to dower.²³⁶

As the policy of the law, in the interest of wife and children, avoids the sole deed of the husband, it cannot be enforced against him as an estoppel, though he may have obtained a loan on mortgage by representing himself as a single man.²³⁷ Neither can an executory written contract for the sale of the homestead be enforced specifically, unless it is executed, acknowledged, and recorded in all respects as the statute requires the ultimate deed to be.²³⁸ Nor can land held and possessed by such contract, or otherwise by equitable title, be assigned or pledged, except in the statutory manner;²³⁹ and, generally speaking, there can be no equity worked out to deprive a family of its homestead, where the statute has not been followed in the attempted conveyance.²⁴⁰ Where the statute

²³⁶ Billingsley v. Niblett, 56 Miss. 537; and so in Tennessee a mortgage given to lift liens older than the homestead is good, Leonard v. Mason, 1 Lea, 384; but in Minnesota the husband alone cannot mortgage for the timber to build with, Smith v. Lackor, 23 Minn. 454; for shifting of purchase money debt, see Bentley v. Jordan, 3 Lea (Tenn.) 353.

²³⁷ Whitlock v. Gosson, 35 Neb. 829, 53 N. W. 980 (compare misrepresentation of age by infant); nor is the husband estopped by warranty, Alt v. Banholzer, 39 Minn. 511, 40 N. W. 830; nor by both in Georgia, Timothy v. Chambers, 85 Ga. 267, 11 S. E. 598. But see, for estoppel as to quantity of homestead by recital in mortgage, Klenk v. Knoble, 37 Ark. 298; Webb v. Davis, Id. 551; and Koons v. Rittenhous, 28 Kan. 359,—where the wife was absent from the state, and the owner pretended to be single.

²³⁸ Stodalka v. Novotny, *supra*; Clarke v. Koenig, 36 Neb. 572, 54 N. W. 842; Anderson v. Culbert, 55 Iowa, 233, 7 N. W. 508. In Texas, husband and wife cannot sell by executory contract. Jones v. Goff, 63 Tex. 248; Barton v. Drake, 21 Minn. 299; Jenkins v. Harrison, 66 Ala. 345 (good in suit for damages).

²³⁹ Jelinek v. Stepan, 41 Minn. 412, 43 N. W. 90; Griffin v. Proctor's Adm'r, 14 Bush (Ky.) 571; Wheatley v. Griffin, 60 Tex. 209 (certificate of school lands); Belden v. Younger, 76 Iowa, 567, 41 N. W. 317 (consent must be in writing); Stinson v. Richardson, 44 Iowa, 373.

²⁴⁰ So in Hensey v. Hensey's Adm'r, 92 Ky. 164, 17 S. W. 333, under statute requiring recording, which the grantee can have done, lack of lodgment for record was held fatal; Stodalka v. Novotny, *supra*, no relief was given against bad advice of scrivener; Balkum v. Wood, 58 Ala. 612 (lacking formalities not

does not make the wife's or husband's assent depend on the condition that the spouses live together, or that both be residents, the absence of the wife in another state (unless, perhaps, it be by her wanton desertion of the husband) does not dispense with the necessity for her assent.²⁴¹ And the lack of her signature renders the deed void, though neither she, nor her child, nor any one claiming under her, is interested in opposition thereto.²⁴²

But it has been held in some states that the owner's sole deed becomes good if the homestead be afterwards abandoned, especially if he conveys with a view to such abandonment and to the purchase of another homestead. The husband can thus change his home-

supplied). But in *Whitmore v. Hay*, 85 Wis. 240, 55 N. W. 708, the court relieved, on good consideration, against the mistake of the wife, who failed to sign as she had intended, under bad legal advice. And a mistake in the description may be corrected, *Snell v. Snell*, 123 Ill. 403, 14 N. E. 684; nor will a conflict between quantity and description aid the homesteader, *Reid v. McGowan*, 28 S. C. 74, 5 S. E. 215.

²⁴¹ *Whitlock v. Gossom*, *supra* (the nonsigning wife was in an asylum out of the state); *Alexander v. Vennum*, 61 Iowa, 160, 16 N. W. 80 (joinder of insane wife of no effect; a decision resulting in favor of an execution creditor, the homestead having been abandoned); *Sherrid v. Southwick*, 43 Mich. 515, 5 N. W. 1027 (wife absent through husband's misconduct); s. p., *Barker v. Dayton*, 28 Wis. 367, 383; *Castleberry v. Maynard*, 95 N. C. 282 (deed null, though wife divorced a mensa); *Ott v. Sprague*, 27 Kan. 620 (wife absent and suing for divorce). But in Texas, when the homestead is of community property, the wife can sell, if the husband "abandons her without cause," for the support of the family. *Hector v. Knox*, 63 Tex. 613. Husband and wife's carrying on business together at another place with the proceeds of sale of homestead is an abandonment. *Mattingly v. Berry*, 94 Ky. 544, 23 S. W. 215.

²⁴² *Herron v. Knapp, Stout & Co.*, 72 Wis. 553, 40 N. W. 149 (claim by children of a former wife); *Griffith v. Ventress*, 91 Ala. 366, 8 South. 312; *Shoemaker v. Collins*, 49 Mich. 597, 14 N. W. 559 (wife dies before husband); *Dye v. Mann*, 10 Mich. 291 (void against subsequent grantee of husband and wife); against the husband if wife not privily examined, *Mash v. Russell*, 1 Lea (Tenn.) 543; against devisee or subsequent purchaser, *Lear v. Totten*, 14 Bush (Ky.) 101; *Tong v. Eifort*, 80 Ky. 152. But in Ohio the nonjoinder of the wife makes the husband's deed void only against her and children (section 5442). So, in Vermont, voidable only against the family. *Whiteman v. Field*, 53 Vt. 554. The idea of nullity was carried so far in *Pipkin v. Williams*, 57 Ark. 242, 21 S. W. 433, that where, after (the conveyance lacking the wife's signature) the homestead was abandoned, an attaching creditor was preferred to the grantee in the defective deed.

stead by his own act. When another is provided, his wife would be at any rate estopped, as she cannot claim two homestead rights.²⁴³ But in Michigan, in Texas, and in California, the husband's sole deed incumbering the homestead was held to receive no force from the subsequent abandonment by husband and wife.²⁴⁴

A deed from the husband to the wife is not within the mischief of the statute, and is good without her signature or acknowledgment.²⁴⁵ But the homestead right remains in the wife (or, when she conveys to the husband, in him), and can only be barred or encumbered by a subsequent joint deed;²⁴⁶ and a deed which is to take effect in futuro, after the life of husband and wife, and when the homestead right under the statute is wholly spent, has been held valid on the same ground as a conveyance of the surplus.²⁴⁷

An assent on behalf of the children is in no case necessary, even if the deed should show, upon its face, that the land has been acquired as a homestead for the benefit of the owner's wife and children.²⁴⁸ In Georgia, however, under a constitution which disables

²⁴³ Alexander v. Vennum, *supra* (sheriff's deed); Wilson v. Gray, 59 Miss. 525; Majors v. Majors, 58 Miss. 806. The acquisition of a new homestead is the ground of decision in Woodstock Iron Co. v. Richardson, 94 Ala. 629, 10 South. 144. But not where the wife is removed against her will, Decorah Sav. Bank v. Kennedy, 58 Iowa, 456, 12 N. W. 479; the statute declaring that the wife must consent to the removal.

²⁴⁴ Phillips v. Stauch, 20 Mich. 369; Gleason v. Spray, 81 Cal. 217, 22 Pac. 551; Myers v. Evans, 81 Tex. 317, 16 S. W. 1060. Deed of trust by husband alone not helped by removal of family, Cummings v. Busby, 62 Miss. 95.

²⁴⁵ Lynch v. Doran, 95 Mich. 395, 54 N. W. 882; Turner v. Bernheimer, 95 Ala. 241, 10 South. 750. See, as to loss of husband's homestead right by his deed to his wife, fraudulent as to creditors, Nichol v. Davidson Co., 8 Lea (Tenn.) 389. But in Georgia, where the homestead can be sold only by order of court, and, if unsold, goes to the heirs, a deed by the husband to the wife, not so ordered, is void as against the heirs. Love v. Anderson, 89 Ga. 612, 16 S. E. 68.

²⁴⁶ Spoon v. Van Fossen, 53 Iowa, 494, 5 N. W. 624. So a re-conveyance to the wife through a "conduit" leaves the homestead right intact. McMahon v. Speilman, 15 Neb. 653, 20 N. W. 10.

²⁴⁷ Ferguson v. Mason, 60 Wis. 377, 19 N. W. 420.

²⁴⁸ Watson v. Neal, *supra*, note 230; Bateman v. Pool, 84 Tex. 405, 19 S. W. 552 (single man with children); Smith v. Von Hutton, 75 Tex. 625, 13 S. W. 18.

even husband and wife jointly from mortgaging the property, or selling it without leave of court, the children while under age are recognized, and the wife and children may sue to recover a homestead improperly sold during the husband's lifetime.²⁴⁹

Where the law, or even the constitution, requires a voluntary signature, no higher freedom of assent is required than in a married woman's execution of a deed under the old system of privy examination; and the certificate of the officer is as conclusive upon her as it would be to a deed barring dower or selling her own land.²⁵⁰ Can two tenants in common have homestead in one farm? If there is only one dwelling house, they can at best have one in measurement and value; and their deed, their wives not joining, is at worst good for the excess over the one homestead right.²⁵¹

Grants of the right of way over the homestead farm, made by the husband alone to a railroad or turnpike company, and not interfering materially with the use of the place, have been sustained; and a like grant was held good in Kansas upon the oral assent of the wife, as the constitution does not prescribe the form of assent.²⁵² On the other hand, an oil lease, where the main value of the farm rested on its wealth in oil, or a sale of merchantable timber made by the husband alone, was held bad, upon the same ground that such acts in a life tenant would be deemed waste; wherein, perhaps,

²⁴⁹ *Planters' Loan & Sav. Bank v. Dickinson*, 83 Ga. 711, 10 S. E. 446 (sets forth the rule under both constitutions); *Eve v. Cross*, 76 Ga. 693.

²⁵⁰ *Shelton v. Aultman & Taylor Co.*, 82 Ala. 315, 8 South. 232; *Miller v. Marx*, 55 Ala. 322 (heard with other homestead cases, and many points decided). A mistake in the wife's signature, immaterial in other deeds, is immaterial here. As to requisites of certificate in Alabama, see *Scott v. Simons*, 70 Ala. 352; *Levins v. Rovegno*, 71 Cal. 273, 12 Pac. 161 (where the wife purposely signed wrong initials). As to "voluntary signing" under the constitution of North Carolina, see *Hughes v. Hodges*, 102 N. C. 236, 9 S. E. 437; *Fleming v. Graham*, 110 N. C. 374, 14 S. E. 922; privy acknowledgment to be "substantially" correct, *Gates v. Hester*, 81 Ala. 357, 1 South. 848; and the wife's ignorance as to the land mortgaged being her homestead is no defense against a lender in good faith, *Edgell v. Hagens*, 53 Iowa, 223, 5 N. W. 136; *Peake v. Thomas*, 39 Mich. 584.

²⁵¹ *McGuire v. Van Pelt*, 55 Ala. 344.

²⁵² *Chicago, T. & M. C. Ry. Co. v. Titterington*, 84 Tex. 218, 19 S. W. 472; *Ottumwa, C. F. & St. P. Ry. Co. v. McWilliams*, 71 Iowa, 164, 32 N. W. 315; *Pilcher v. Railroad Co.*, 38 Kan. 516, 16 Pac. 945.

the courts went too far, as the great majority of homesteaders are not supposed to have either mineral oil or salable timber.²⁵³

The release of the homestead right, as that of dower, when made for the benefit of certain creditors, is understood to be limited to that purpose. Whenever they are satisfied, either out of the property or otherwise, the wife's consent to the release is at an end. Other creditors or purchasers cannot profit by it.²⁵⁴

Where a married man cannot mortgage his homestead, he cannot waive the exemption; for to do so is simply a mortgage in favor of the judgment creditor.²⁵⁵ And where the statute (as that of California, passed in 1862) prescribes the mode of execution by husband and wife, it would follow that a deed by attorney in fact, on behalf of one or the other, would be ineffectual.²⁵⁶

As there may be a homestead right in lands held by a lesser estate than a fee, such as a tenancy for life or for years, the disability of the owner to convey the homestead without the wife's consent will apply to these, where the holding has any substantial value; for instance, when the householder owns the buildings upon leased ground.²⁵⁷

The right of the legislature to deprive the owner of a homestead of his free disposition over his own land acquired before the passage of the law has generally been acquiesced in, and in at least one case (in Mississippi) it has been expressly sustained; while the supreme court of North Carolina went so far as to deny even to the people in state convention the power of depriving a man of the free disposition of his land then owned by a constitutional prohibition. And the supreme court of South Carolina has also, in a strong dictum, denied the right of a legislature to do so.²⁵⁸

²⁵³ *McKensie v. Shows*, 70 Miss. 388, 12 South. 336; *Franklin Land Co. v. Wea Gas, Coal & Oil Co.*, 43 Kan. 518, 23 Pac. 630. A fortiori, an agricultural lease, depriving the family of possession. *Coughlin v. Coughlin*, 26 Kan. 116.

²⁵⁴ *Jackson v. Shelton*, 89 Tenn. 82, 16 S. W. 142; *White v. Fulghum*, 87 Tenn. 281, 10 S. W. 501.

²⁵⁵ *Ferguson v. Kumler*, 27 Minn. 156, 6 N. W. 618. And the widow is not bound by the husband's recognition of a paramount title. *Beedle v. Cowley*, 85 Iowa, 540, 52 N. W. 493.

²⁵⁶ *Gagliardo v. Dumont*, 54 Cal. 496.

²⁵⁷ *Pelan v. De Bevard*, 13 Iowa, 53.

²⁵⁸ *Massey v. Womble*, 69 Miss. 347, 11 South. 188. Contra, *Gilmore v.*

Many of the states have made provisions for obtaining a consent on behalf of an insane wife to the husband's conveyance of his homestead, just as they have provided for the barring of dower under the like circumstances; generally, by empowering the guardian or committee to give the assent upon terms to be approved by either a probate or superior court.²⁵⁹

In those states in which the owner alone may incumber the homestead for the purchase money, or for improvements, or to lift incumbrances, the validity of mortgages must often depend on parol proof. A mortgage by the owner alone, describing the premises as his dwelling, is not thereby rendered void on its face, for the debt or loan may be of the permitted kind. On the other hand, a recital in the deed that the incumbrance is made for improvements or to lift incumbrances would hardly be even *prima facie* evidence against the wife or family.²⁶⁰

§ 114. Devolution of the Homestead.

Assuming that the owner of a homestead has died without having made a valid conveyance, the questions arise: What rights have his widow and his children against his creditors? What rights have the minor children against grown children or grandchildren? What rights has the widow as against her own children? And, lastly, what rights has she as against collateral heirs? These questions can be answered only from the statutes of the several states.²⁶¹

Bright, 101 N. C. 382, 7 S. E. 751; Bruce v. Strickland, 81 N. C. 267; Reeves v. Haynes, 88 N. C. 310; Watson v. Neal (S. C.) *supra*.

²⁵⁹ For instance, Massachusetts, c. 139, § 16; *Id.* c. 147, § 20.

²⁶⁰ Willis v. Meadors, 64 Ga. 721.

²⁶¹ The rights of the widow and children are in the nature of descent, and follow the law in force at the father and husband's death. Threat v. Moody, 87 Tenn. 143, 9 S. W. 424. For the statute citations, we refer to the section on "Homestead Exemptions" in a later chapter, also to those in the section next preceding this, as being in the immediate neighborhood of those on which the following remarks are based. In Virginia, where land and personality to a named value are exempt, but not as a homestead, the widow has no particular rights in the exempt property when there are no debts. She can hold it against creditors, but not against the heirs. Barker v. Jenkins, 84 Va. 895, 6 S. E. 459.

The rights of the widow (or widower) and children against the creditors of the deceased or their own creditors will be treated elsewhere. The rights given to the family of the deceased—i. e. widow (or surviving husband) or minor children—are in most states, but not in all, superior to the owner's will.²⁶² But in some states a branch of the law of descent disposes of the homestead of an intestate owner, and the right to devise it is left open either expressly or by implication (expressly in Wisconsin);²⁶³ while in Mississippi this part of the statute of descent is construed, like all other parts, as leaving to the owner an untrammeled power of disposition by will.²⁶⁴

Where the widow is secured against deprivation of the homestead by devise, the same security is generally given to a surviving husband.²⁶⁵ And where the homestead is thus secured to the widow or widower, generally, she or he need not, in order to hold it, renounce the will, as is the case with dower.²⁶⁶

²⁶² *Meech v. Meech*, 37 Vt. 419; *Jarman v. Jarman*, 4 Lea (Tenn.) 671. In Massachusetts (chapter 123, § 8), "the estate of homestead continues for the benefit of the widow and minor children, if some of them occupies the premises, till the youngest child comes of age, and until death or marriage of the widow"; and subject to this it descends, may be devised, etc. *Brettun v. Fox*, 100 Mass. 234, strongly doubting *Wilbur v. Hickey*, 8 Gray (Mass.) 432, where a deed by husband's guardian under license was held to bar the widow. The homestead right continues though there are no debts. *Monk v. Capen*, 5 Allen (Mass.) 146. So in Kentucky, *Eustache v. Rodaquest*, 11 Bush (Ky.) 42; but not under the first homestead act of 1866, *Little v. Woodward*, 14 Bush (Ky.) 585. See, also, *Bell v. Bell*, 84 Ala. 64, 4 South. 189.

²⁶³ Compare Wisconsin, St. §§ 2271, 2280.

²⁶⁴ *Turner v. Turner*, 30 Miss. 428; *Norris v. Callahan*, 59 Miss. 140; *Osburn v. Sims*, 62 Miss. 429; *Nash v. Young*, 31 Miss. 134 (widow cannot get homestead by renouncing will). The Codes of 1871, 1880, and 1892 are at one; only speak of descent.

²⁶⁵ New Hampshire, Pub. St. infra; Maine, Rev. St. infra, note 207; so, also, in Mississippi, Kansas, and in states like California, Texas, etc., which have the régime of community between husband and wife. But in Kansas the homestead "descends," and the widow must choose between it and the will. Gen. St. § 7245.

²⁶⁶ So held in Alabama under section 2544 of Civ. Code; in Missouri and elsewhere, but not in Iowa. For authorities, see hereafter, in chapter on "Estoppe and Election."

A statute which simply directs that after the death of the owner and occupant a homestead shall remain exempt during the life of the widow or the minority of the child or children (such as those of New York, Michigan, and Minnesota), by its own force gives to her and to them the enjoyment of the homestead during that time; but does not, without more, confer an estate in the wife or minor children as against adult children or collateral kindred. The Maine statute gives this right of occupancy during the wife's widowhood and the minority of the children in express words. So, also, in New Hampshire, where both widower and widow enjoy the right of occupancy, without restriction during life. And the New Jersey act is similar.²⁶⁷

The nature of the interest, which the "continuance" of the homestead gives to the wife (or husband) and children in the several states is very different. In Kansas and in Mississippi a descent is cast on those to whose benefit the homestead goes, and the interest therefore is a fee simple. In Massachusetts, though the estate, limited by the remarriage of the widow and the coming of age of the youngest child, is further conditioned upon occupancy by one of them, it is deemed a freehold, and the heir holding subject to the homestead

²⁶⁷ But the supreme court of Michigan has been very reluctant to allow the right of homestead to the widow, except against creditors. It is exempt by constitution and law while it is occupied by the widow and minor children. This does not prevent a partition in suit by the heirs. *Robinson v. Baker*, 47 Mich. 619, 11 N. W. 410; *Patterson v. Patterson*, 49 Mich. 176, 13 N. W. 504 (where trespass against the heir was sustained only because his entry was forcible); *Zoellner v. Zoellner*, 53 Mich. 620, 19 N. W. 556 (which went against the widow because the homestead was worth over \$1,500 and indivisible, and the letter of the constitution gave no homestead right at all, while the remedial statute was aimed only against creditors, and not against the heirs); Maine, Rev. St. c. 81, § 66; New Hampshire, Pub. St. c. 138, § 2. The New Jersey statute, "Sale of Land," § 53, gives the benefit to the widow and family, as long as some or one of them occupy it, till the youngest child attains the age of 21, and till the widow's death, as an exemption. So it is in New York (Code Civ. Proc. § 1400): when the dead owner was a woman, during the infancy of her children; if a man, during the life of the widow, and infancy of children. Similarly in Minnesota (Rev. St. c. 68, § 1). No cases seem to be reported in these three states as to the right of widows and children, as against heirs and devisees, when the estate is solvent.

right is a reversioner. While in Iowa this right of occupancy is not considered an estate at all, it is not subject to execution for the occupant's debts, and cannot be conveyed or exchanged, as the departure of the occupant would destroy his interest. For the same reason the widow's right "to continue" cannot, in Alabama, be sold for the widow's debt, and such seems to be the view held in South Carolina.²⁶⁸ In Kentucky the occupancy of the widow and children, given by the statute, has by liberal construction been turned very nearly into a life estate. If the widow leases the place and puts a tenant in possession it is not deemed an abandonment, though it would have been such if the owner had done it in his lifetime. If the home tract is sold \$1,000 are invested for her, and she has been allowed to take the table value as a life tenant; but her undivided interest in the home tract will be included in the maximum value.²⁶⁹ In California and other states having the régime of community, a homestead taken from the community property, or selected with the assent of the owner out of his or her separate property, survives in fee to the other spouse; only when it is selected from separate property without the owner's consent it goes to such owner's heirs, subject only to the power of the proper court to assign it to the family for a limited time; and this does not create a salable estate.²⁷⁰ While in Michigan the rights of the widow against the

²⁶⁸ Mississippi, Code, § 1551, and cases from that state *supra* and *infra*; Kerley v. Kerley, 13 Allen (Mass.) 286; Smith v. Eaton, 50 Iowa, 488; Size v. Size, 24 Iowa, 589; Barber v. Williams, 74 Ala. 331; Hosford v. Wynn, 22 S. C. 309.

²⁶⁹ And in like manner the wife's homestead survives to the husband for life against heirs and creditors. Ellis v. Davis, 90 Ky. 183, 14 S. W. 74; Acton v. Phipps, 12 Bush (Ky.) 375 (where, however, the minor child must have been protected); Sansberry v. Simms' Adm'r, 79 Ky. 527; Miles v. Hall, 12 Bush (Ky.) 109; Allensworth v. Kimbrough, 79 Ky. 332. In Myers' Guardian v. Myers' Adm'r, 89 Ky. 442, 12 S. W. 933, very oddly, it was held that the father, by devising the homestead to a minor child, could exempt it in fee. The homestead may be devised to the widow alone, Pendergest v. Heekin, 94 Ky. 384, 22 S. W. 605; and will be free of debt, Hazellett v. Farthing, 94 Ky. 421, 22 S. W. 646.

²⁷⁰ California, Code Civ. Proc. § 1274; Washington, Code Proc. § 972; Lord v. Lord, 65 Cal. 84, 3 Pac. 96 (should be selected from community property if there is any). These rights are superior to husband's will. Walkerley's Estate, 77 Cal. 642, 20 Pac. 150. In Texas the homestead cannot be devised

heirs or devisees have been conceded somewhat grudgingly,²⁷¹ the Virginia courts have, under a similar clause in the state constitution, taken the ground that nothing but an "exemption" is continued to the family; and that, in the absence of debts for which the homestead might but for the exemption be sold, the widow or minor children have no special rights therein.²⁷²

Among the statutes which regulate the descent in fee simple, that of Mississippi makes the surviving spouse and the children tenants in common, the former having a child's share. If there are none of the latter the former takes alone, and vice versa; but if the surviving spouse have a residence of equal or greater value than the legal homestead (\$2,000), and no children with the deceased owner, but there are children by a former spouse, then these alone inherit. It has been held under this statute that "children" must be taken literally, and grandchildren by a deceased child cannot take in presence of a surviving widow.²⁷³ In Alabama, the estate of the widow and minor children is worked out only from the exemption during her life and their minority. The widow cannot abandon the home so as to exclude the minor child. If she sells and abandons it, the minor child can recover it as heir. The widow and children are not tenants in common, for there is, strictly speaking, no estate.²⁷⁴ The Arkansas law, though not a law of descent in terms, gives the homestead to the widow, if she has none in her own right. The rents and profits vest in her during life. As long as there are minor children, these and these alone are entitled to one-half of the rents and profits. The shares of those coming of age pass over to the younger, and the widow or children may "reside on the homestead

so as to deprive the minor children of their statutory interest in it. *Hall v. Fields*, 81 Tex. 553, 17 S. W. 82. Where the estate is large over and above all debts, the court may allot a homestead worth more than \$5,000. *Smith v. Smith*, 99 Cal. 449, 34 Pac. 77. The order of allotment is binding as a judgment. *In re Moore's Estate*, 96 Cal. 524, 31 Pac. 584.

²⁷¹ *Coolidge v. Wells*, 20 Mich. 79.

²⁷² Virginia, Const. art. 11, § 1. The position of the text is based on *Helm v. Helm's Adm'r*, 30 Grat. 404, and *Barker v. Jenkins*, 84 Va. 895, 6 S. E. 459, under Code 1873, c. 183, § 8; and the section in the new Code (section 3635) is substantially like the former.

²⁷³ *Peeler v. Peeler*, 68 Miss. 141, 8 South. 392.

²⁷⁴ *Barber v. Williams*, supra, note 268; *Fellows v. Lewis*, 65 Ala. 343.

or not." The right is clearly given, against the heirs as well as against the husband's creditors.²⁷⁵

The Ohio law on the administration of estates directs the appraisers to set off a legal homestead, when there is "a widow or minor child." From the context, the homestead being coupled with dower, it would appear that the enjoyment would not last beyond the life of the wife and the minority of a child or children.²⁷⁶ The Tennessee Code is, compared with other revisions, remarkably clear. On the husband's death, his homestead goes to the widow for life, for her own use and that of her family who reside with her; on her death, to the minor children of the deceased till they die or come of age; and then returns into the estate, subject to the laws of descent or devise, and the payment of debts. If the legal homestead cannot be set apart, \$1,000 of the proceeds of the home place must be invested in land upon these limitations, for the benefit of the widow and minor children.²⁷⁷

West Virginia seems to have adopted a wholly different policy. Under its law the homestead, upon the death of the husband or parent, goes to the minor children during their minority, "unless they sooner die."²⁷⁸

The Illinois law has been construed so as to fully protect the minor children until the youngest comes of age, as well as the surviving spouse; for the continuing homestead right cannot be defeated, either by will or by antenuptial contract or jointure, as

²⁷⁵ Hoback v. Hoback, 33 Ark. 399; Trotter v. Trotter, 31 Ark. 145. The present law is broader than that discussed in Gilbert v. Neely, 35 Ark. 24, which gave a mere right of occupancy. But, even under that law, the widow might use part of the house as a hotel, and still be deemed an occupant. Gainus v. Caunan, 42 Ark. 503.

²⁷⁶ Ohio, Rev. St. § 6155 (1886); under an older law it was "widow and minor child." See Taylor v. Thorn, 29 Ohio St. 569. If the husband left no homestead, the widow is not entitled to compensation out of other estate. Wolverton v. Paddock, 3 Ohio Ct. R. 488.

²⁷⁷ Code, §§ 2943, 2944. The interest following those of the widow and minor children is called a "remainder," their interest being a freehold. Lunsford v. Jarrett, 2 Lea (Tenn.) 579, 580. When there is no widow or minor children (section 2945), the homestead, subject to the payment of debts, goes to the heirs. See, for children's rights after widow's death, Webb v. Cowley, 5 Lea (Tenn.) 722.

²⁷⁸ West Virginia, Code, c. 41, § 34.

dower might be, in which the widow alone has any legal rights. This is so under the law of 1872, in force now as part of the Revision. Before then the widow had no homestead right against the heirs. In case of a sale of a larger homestead for debt, or in partition, the interest of the widow or minor heirs in the maximum of \$1,000 should be ascertained and paid out to them.²⁷⁹

In Missouri, as in Massachusetts, the homestead is bound by the laws of devise, descent, or sale for debts, subject to the interest given to the widow or minor children, and when there are such, to the widow and minor children. These rights, therefore, are good against the heirs. The widow's right extends to her death. She can, whether remarried or not, lose the homestead right by abandonment, of which removal is the best proof; but she cannot by any act of abandonment deprive the minor children of the rights which they have during their own minority.²⁸⁰

In Wisconsin, the homestead of an intestate, since 1883, descends as follows: (1) If he has no lawful issue, to the widow; (2) if he leave a widow and issue, to the widow during her widowhood, and after her death or marriage to his issue, like other lands; (3) if he leave issue and no widow, to the issue; (4) if no widow or issue, to descend as other lands. The homestead is taken out first. The widow's dower is on the value of the other lands. When she marries again and loses the homestead, she takes her dower in it.²⁸¹

²⁷⁹ For wife's right against husband's grantee, see *Hotchkiss v. Brooks*, 93 Ill. 386; *McGee v. McGee*, 91 Ill. 548 (children). But children are barred by conveyance of husband and wife, and cannot assail a decree of foreclosure rendered against both, *Clubb v. Wise*, 64 Ill. 157; *Merritt v. Merritt*, 97 Ill. 243; *Turner v. Bennett*, 70 Ill. 263, and *McVey v. McQuality*, 97 Ill. 93 (no right against heirs before 1872); widow's right not lost by remarriage, *Yeates v. Briggs*, 95 Ill. 79; widow without children has full right, *White v. Plummer*, 96 Ill. 394.

²⁸⁰ *Kaes v. Gross*, 92 Mo. 647, 3 S. W. 840 (child's rights reserved); *Rhorer v. Brockhage*, 86 Mo. 544. Quaere, can the wife's homestead right be barred by antenuptial contract, if expressly named? *Mack v. Heiss*, 90 Mo. 578, 3 S. W. 80. Before 1875 the homestead went to the widow in fee, so as to descend on her death to her own heirs. *Skouten v. Woods*, 57 Mo. 380. This right was fixed at the husband's death, and could not be curtailed by later statute. *Register v. Hensley*, 70 Mo. 189.

²⁸¹ Section 2271 of the statute was thus amended by act of 1883 (chapter 301). The word "issue" was chosen to make the section conform to the general
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In Nebraska, there are elaborate provisions about appraising the homestead and selling it, if the widow desires; but when this is done, the homestead, to the extent of \$1,000, goes to the widow absolutely, by way of descent; and she can only be deprived thereof by will, if she consents thereto in writing within 30 days after the lodging of the will for probate. A surviving husband has corresponding rights. When there is no widow or widower, the homestead descends as other lands.²⁸² Kansas, also, has a special law of homestead descent. The exempted homestead shall be the absolute property of the widow and children; the widow to select the 160 acres if the home place is larger in extent. If there is no widow, the whole title is in the children. If no children, the whole goes to the widow. When the youngest child comes of age, or when she marries, if the youngest be a girl, the place is to be divided,—one-half to the widow, one-half to the children. In these three states there is no distinction between grown and infant children, nor between those residing upon the home place or away from it.²⁸³

The Iowa statute is simple enough. On the death of the owner, the surviving widow or widower may "possess and occupy" the whole until disposed of by law,—that is, until the descendible share in the decedent's estate is allotted to her or him; but the survivor may retain the homestead for life in preference to this share. Subject to this right the home place may be devised, and passes by descent like other land.²⁸⁴ Very similar is the Dakota Code (where the descent or any devise is subject—First, to the right "to possess and occupy"

law of descent. As to devise in homestead land, see *Bresee v. Stiles*, 22 Wis. 120. Abandonment by or of the wife seems now immaterial. *Keyes v. Scanlan*, 63 Wis. 345, 23 N. W. 570.

²⁸² Nebraska, St. § 1124 (which contains all the canons of descent). Widow's right lost by her abandonment of her husband, and gaining own homestead, *Dickman v. Birkhauser*, 16 Neb. 686, 21 N. W. 396; approved, but not applied, in *Lamb v. Wogan*, 27 Neb. 236, 42 N. W. 1041.

²⁸³ Gen. St. pars. 2594-2597; *Green v. Green*, 34 Kan. 740, 10 Pac. 156; *City of Leavenworth v. Stille*, 13 Kan. 548; *Vining v. Willis*, 40 Kan. 616, 20 Pac. 232; *Crimmins v. Morrisey*, 36 Kan. 447, 13 Pac. 748. Not subject to partition while widow occupies it, *Hafer v. Hafer*, 33 Kan. 449, 6 Pac. 537; half to widow, half to minor child, subject to taxes and arrears of purchase money, *Reynolds v. Reynolds*, 30 Kan. 91, 1 Pac. 388.

²⁸⁴ Ann. Code, § 3645. Assets not to be marshaled against widow. *Kite v. Kite*, 79 Iowa, 491, 44 N. W. 716.

of the surviving spouse; next, to a like right of the children, till the youngest comes of age);²⁸⁵ while in Wyoming, the homestead passes to the surviving spouse and minor children in fee, and for the lack of these passes as other lands by devise or descent.²⁸⁶ The constitution of North Carolina not only exempts the homestead after the owner's death from sale for his debts during the life of his widow or the minority of any child, but "the rents and profits shall inure to her (the widow's) benefit, unless she be the owner of a homestead in her own right."²⁸⁷

In Virginia there is no homestead right, but only an exemption in favor of men with a family of a sufficient amount to embrace it. The widow can hold the exempted property against the creditors of the decedent, but not against the heirs and next of kin, or the devisees of the husband, when there are no debts to encroach upon it, except as far as her dower may go.²⁸⁸

In Florida there can be no homestead right against heirs, for the exempted land passes by descent only, and can neither be devised nor charged with legacies, but is subject to dower; the exemption continuing though the heirs be not of the late owner's immediate household.²⁸⁹ And such seems also to be the law in Georgia, where the widow may, after the death of her husband, select her own homestead from the lands descending on her.²⁹⁰

When there has been a divorce a vinculo, the court ought, in its decree, to settle the question whether the wife is thereafter to have any rights in the husband's homestead. Whenever the divorce is granted for the survivor's fault, she or he can have no right to succeed to the homestead of the other, any more than to curtesy or

²⁸⁵ Dakota Territory, Code, c. 38, §§ 14-16. Becomes subject to debts when no widow or widower and no issue is left.

²⁸⁶ Wyoming Territory, Rev. St. § 2782.

²⁸⁷ Under North Carolina Code, § 514, the "widow, if he leave no children, or the child or children" under 21, of a deceased homesteader, may have the exceptions laid off, if he had not done so. See *Gregory v. Ellis*, 86 N. C. 579.

²⁸⁸ Virginia, Code § 3640; *Helm v. Helm*, 30 Grat. 404.

²⁸⁹ Carter's Adm'r's v. Carter, 20 Fla. 558; *McDougall v. Brokaw*, 22 Fla. 98; *Scull v. Beatty*, 27 Fla. 426, 9 South. 4 (where some of the heirs were adults and nonresidents). This is the plain language of the constitution.

²⁹⁰ The allotment by the ordinary is binding on all parties. *Deyton v. Bell*, 81 Ga. 370, 8 S. E. 620.

dower. The statutes defining the property rights of husband and wife after a divorce generally speak only of "dower, courtesy, and distributive share"; and those words would cover the continuing homestead only in the few states in which it is conferred on widow and children by way of descent,—not in Massachusetts or Missouri, where the continued occupancy is an exception to the laws of descent and devise.²⁹¹

In the states in which the homestead must be formally selected by or for the owner, approved by a court, and its boundaries recorded, the widow may generally make the selection after the husband's death, if it was neglected during his lifetime; but she cannot clothe the land with the character of his homestead if it was not such in reality.²⁹²

§ 115. Homestead and Dower.

In the states which retain dower, and in those also which substitute for it a descendible share, the widow has in her homestead right an estate or interest to be carved out from the same lands from which the dower or thirds must come; and, whenever the husband leaves land in excess of the maximum homestead right, the questions arise: Can the widow have full dower on the aggregate value of the whole land, and the whole of a legal homestead besides? Or can she have only one-third of the lands other than the homestead? Or, lastly, must she not accept an allotment of dower that will comprise the homestead, and be satisfied therewith?

It seems that in Massachusetts and Michigan the first view, which is most favorable to the widow, has been taken. The widow takes her dower first, i. e. one-third, and the homestead out of what remains.²⁹³ Vermont has laid down a more equitable rule. As the

²⁹¹ *Stahl v. Stahl*, 114 Ill. 378, 2 N. E. 160; *Rendleman v. Rendleman*, 118 Ill. 260, 8 N. E. 773. In *Blandy v. Asher*, 72 Mo. 27, the divorce by itself did not destroy the right.

²⁹² *Ward v. Mayfield*, 41 Ark. 94.

²⁹³ *Mercier v. Chace*, 11 Allen (Mass.) 194 (though, if the widow takes one-third of the rents for dower, she may estop herself from her homestead right, as that cannot be put into like shape, *Bates v. Bates*, 97 Mass. 392); *Showers v. Robinson*, 43 Mich. 502, 5 N. W. 988 (which relies on *Walsh v. Reis*, 50 Ill. 477; *Bursten v. Goodspeed*, 60 Ill. 477). *Wallace v. Harris*, 32 Mich. 380, is not so favorable to the widow.

widow and minor children have the right of occupancy of the homestead, it is set aside to them first, and she has then one-third of the remaining lands allotted to her for dower. This doctrine has also been adopted in Illinois, where an older case allowed the widow to take her \$1,000 for the homestead first, and afterwards dower in the undiminished value of the lands; and the Vermont rule has also been adopted in Tennessee.²⁹⁴ And, of necessity, in Wisconsin and Nebraska, where the homestead descends in a prescribed manner to the widow and children, she must be treated as an heir; that is, one-third of what thus descends to her must go into the allotment of dower, and so she gets one-third of the other lands.²⁹⁵ In Kentucky the statute, speaking of the continued right of possession given to the widow and minor children, says it shall be estimated in assigning dower. Thus, whenever the lands left are worth more than \$3,000, the widow gains nothing by the homestead right. She only incurs through it the obligation of housing the minor children.²⁹⁶

In North Carolina the constitution secures to the widow the rents and profits of the homestead (limited to \$1,000) during her widowhood, "unless she shall be the owner of a homestead in her own right." But the act which regulates the allotment of dower says that the dower tract shall embrace the dwelling and adjoining land. Thus it seems that if the husband had a home place worth \$1,000, which is allotted as dower, the widow gains nothing by the homestead law, and her minor children have no independent homestead right during her life. Yet, while professing uniformity of decision, the supreme court thought in one case that the widow might hold on to the homestead, as such, and take her dower in her husband's other lands.²⁹⁷

²⁹⁴ Doane v. Doane's Heirs, 33 Vt. 649; Chaplin v. Sawyer, 35 Vt. 290; Merritt v. Merritt, 97 Ill. 243, 255; Tennessee, Code, § 2944; Lankford v. Lewis, 9 Baxt. 127; Jarman v. Jarman, 4 Lea, 672. Wright v. Dunning, 46 Ill. 272, is an estoppel of a dowress somewhat like that in Massachusetts.

²⁹⁵ In states in which the homestead is not limited in value this rule is almost unavoidable. Bressee v. Stiles, 22 Wis. 120, giving the widow dower in the homestead tract on remarriage, was decided under an old statute limiting the homestead right to her widowhood.

²⁹⁶ Eustache v. Rodaquest, 11 Bush (Ky.) 46; Gasaway v. Woods, 9 Bush (Ky.) 72; Sansberry v. Simms, 79 Ky. 527.

²⁹⁷ Watts v. Leggett, 66 N. C. 197; Graves v. Hines, 108 N. C. 262, 13 S. (SSO)

In Alabama the widow, having been endowed of other lands, may take her homestead right. Practically, this is the Vermont rule.²⁹⁸ The Ohio homestead law declares that it "shall not impair the right of dower"; but it seems to have been construed in the same way by the supreme court of that state, and the words in another clause awarding "homestead and dower" seem to be cumulative, like the Massachusetts rule.²⁹⁹ The South Carolina cases look in the same direction, but are not quite clear.³⁰⁰

In Georgia the acts relating to dower, homestead, and family award (year's support) are so construed that the widow is not to receive all these benefits cumulatively; but the widow and minor children take the homestead tract, subject to the widow's dower therein, and to "the year's support." The widow's allotted dower tract may, by her consent, be turned into a homestead, whereby the children's interest would be extended into a fee. In like manner she may claim as dower a tract which she has first selected as a homestead, if she finds dower to be more secure.³⁰¹

In Missouri it is said that both homestead and dower may be apportioned when the homestead has to be sold, ascertaining the value according to the Northampton life table. The widow is to take her homestead first, and, in addition thereto, the use of as much more, or an annuity equal to the interest of as much more, as will amount in the aggregate to one-third of the husband's lands.³⁰²

Altogether, the rule denoted above as the "Vermont Rule" seems the most natural and reasonable, and should be presumed to prevail where no decisions to the contrary are known.

E. 15 (children cut out); *McAfee v. Bettis*, 72 N. C. 28 (why not dower in other lands?); *Gregory v. Ellis*, 86 N. C. 579.

²⁹⁸ *Jordan v. Strickland*, 42 Ala. 315; *Thornton v. Thornton*, 45 Ala. 274; *Hudson v. Stewart*, 48 Ala. 206.

²⁹⁹ *Rev. St. 1890*, § 5443.

³⁰⁰ *Hosford v. Wynn*, 22 S. C. 309; *Jeffries v. Allen*, 29 S. C. 501, 7 S. E. 828.

³⁰¹ *Roff v. Johnson*, 40 Ga. 555; *Singleton v. Huff*, 49 Ga. 584; *Page v. Page*, 50 Ga. 597. In *Lowe v. Webb*, 85 Ga. 741, 11 S. E. 845, the homestead was converted into the "year's support," and thus became the widow's property in fee, liable to her debts.

³⁰² *Graves v. Cochran*, 68 Mo. 74.

CHAPTER X.

POWERS.

- § 116. Creation and Nature.
- 117. Validity.
- 118. Construction of Powers.
- 119. Execution—By Whom.
- 120. Time of Execution.
- 121. Manner of Execution.
- 122. Intent to Execute.
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- 124. Aid in Equity.
- 125. Application of Purchase Money.

§ 116. Creation and Nature.

Under a letter of attorney, one man may, in the name of another, convey the estate of the latter. The power in the attorney is not coupled with any estate in him. The attorney's act is, in law, that of the principal, and for that reason his authority comes to an end with the death of the principal.

The owner of land may, while not devising it in any way, empower his executor to sell it for the payment of debts and legacies. Here, also, the power is unconnected with any estate. The land has descended to the heirs. The executor, by making a sale and conveyance, divests them, just as an attorney in fact would have done by a conveyance in his principal's lifetime. The executor's authority only begins with the death of his constituent, instead of ending with it, like that of an attorney. These are "common-law powers."

When speaking of "Powers" generally, law writers include those given to executors, even in the simple form here stated, and exclude powers of attorney. But they treat mainly of those powers which have arisen and taken shape under the statute of uses, which are generally coupled with an interest or estate, and which are created as follows: The owner of land grants or devises it in fee, or for some shorter period, and gives to some person the power, by his deed or will, or by some written instrument, to deflect the estate from the course impressed upon it by the deed or will of the owner,

either generally or within certain limits. The first owner is called the "donor" of the power, he who receives the power is the "donee," the act of deflecting the course of the estate is an "appointment," and the person on whom the estate is thereby conferred is the "appointee." Every appointment thus involves the revocation of the "use" by which the estate was enjoyed at the time of such appointment. Such, at least, is the theory upon which Chancellor Kent, in his noted sixty-second lecture, places those powers which "are of more latent and mysterious character" than common-law powers, and which play such a great part in family settlements, and in the wills of great landed proprietors in England.¹

In our practice the power usually takes a shape somewhat like the following: A., the donor, by will gives his lands for life, say to B., his widow, with a power of sale or with the power in her to devise the fee to some person or persons within a named class, and directs that, in default of such appointment by deed or will, the land is to go in remainder to C., or to some class of persons, say the donor's children or blood relatives. Now, according to our theory, this ultimate remainder to C., or to this class, is the primary devise, and if it is made to persons who are then in being, it is a vested remainder, subject, however, to be divested by the exercise of the power, which thus acts as a revocation of an estate preceding it, though in the creating instrument the power is stated first, and the remainder, to take effect on default of its execution, is named last. When the power takes effect, it operates just as if its mode of exercise had been foretold in the creating instrument, and the "use" had been

¹ The fullest and most authoritative work on "Powers" is that of Sugden, of which the first edition, written by him when almost a boy, is quoted by Kent as the fountain head of all learning on the subject. The notes, English and American, on *Tollet v. Tollet*, 1 White & T. Lead. Cas. Eq. 227, are very useful on the one question how far equity can aid the defective execution of powers. Sugden's first division of powers is: "Either common-law authorities, declarations, or directions, operating only on the conscience of the persons in whom the legal authority is vested, or declarations or directions deriving their effect from the statute of uses." Page 1. It is needless to say, though in many states it is so declared by statute, that persons not capable, by reason of infancy, unsound mind, or coverture, of granting or devising an estate cannot lawfully create a power. Powers may also be granted by the owner of a less estate than a fee, and are valid to the extent of the estate. *Bowman v. Bartlet*, 3 A. K. Marsh. (Ky.) 86.

limited accordingly in the latter. Thus, A., the donor, by his deed grants land to B. for life, after her death to C. and D. in fee, but giving B. a power of appointment by will, and she devises to E. and F. The effect is just as if A. had granted the land to B. for life, remainder to such persons as she may name in her will (and powers are often thus expressed), or, simply, as if A. had granted the land to B. for life, remainder in fee to E. and F. Hence, the title taken under an appointment overreaches one derived from a grantee under the instrument creating the power,—e. g. if a will gives A. an estate for life or in fee, and to B. a power of sale or appointment for any purpose other than for A.'s sole benefit, the purchaser or appointee from B. must prevail, not only against A., but against purchasers from A. or his execution creditors.²

However, it often happens that a deed of settlement, and still oftener that a will, ends with giving an estate for life and a power of appointment over the remainder, without limiting the remainder in default of appointment. No doubt powers found in such instruments are valid, and would be construed just as if the whole fee were limited to the donor's right heirs. There is also a class of powers lying outside of Kent's definition, and resting on the doctrine of trusts, or equitable estates separate from the legal title. Where a will or deed vests such a title to land in executors or trustees, in trust to carry out some purpose,—for instance, to sell for the payment of debts,—and gives them the power to sell and convey, they really convey what is at law their own estate, but the purchaser takes the land free from any trust. And it is so even where the trustee conveys under his trust and power directly to the person to be benefited. The power thus given to a trustee holding the legal title is of exactly the same kind as that which a feoffee to uses might be vested with before the statute of uses turned uses into possession; and if we look at the equitable interest only, such a power may be considered as "simply collateral," being held by one who has no share at all in the estate.³

² Gibbs v. Marsh, 2 Metc. (Mass.) 243; Mayo v. Merritt, 107 Mass. 505; Orrender v. Call, 101 N. C. 399, 7 S. E. 878; Crittenden v. Fairchild, 41 N. Y. 289; Bolton v. Stretch, 30 N. J. Eq. 536.

³ Where statute regulates powers, they need not operate by way of revocation, according to Chancellor Kent's theory, which is also that of Sugden (vol-

Though the donee of a power does not, like an attorney, act in the donor's name, yet the appointee takes his estate as if it had come direct from the donor. Hence, the deed or will in execution of the power cannot reach out further into the future than the empowering deed or will could have done. As the rule against perpetuities forbids the limiting of a life estate on unborn children, with remainder to the children of such children, the donee under a will cannot give a life estate to children born since the donor's death, with remainder over to other persons yet unborn, though he might thus devise his own estate.⁴

The donor and donee are often united in one person, who conveys an estate reserving a power of revocation.⁵ Thus, where married

ume 1, p. 238). The execution of a power works on a reversion just as it would on a remainder. *Leeds v. Wakefield*, 10 Gray (Mass.) 514; *Todd v. Sawyer*, 147 Mass. 570, 17 N. E. 527.

⁴ In the states regulating powers by statute, as shown below, this principle is preserved. New York, Rev. St. pt. 2, c. 1, tit. 2, §§ 128, 129; Michigan, §§ 5644, 5645; Wisconsin, §§ 2152, 2153; Minnesota, c. 44, §§ 54, 55; Dakota Territory, Civ. Code, §§ 330, 331 (for the two Dakotas). For the rule before the statute, see 4 Kent, Comm. p. 337; Sugd. Powers, pp. 468, 469, et seq.; *Salmon v. Stuyvesant*, 16 Wend. 324; *Robinson v. Hardcastle*, 2 Term R. (Durn. & E.) 254; recognized as an old fixed rule in *Genet v. Hunt*, 113 N. Y. 158, 21 N. E. 91 (where a deed with powers was made in 1853, and a will in execution thereof in 1867, and children were born in the meanwhile, the devise in favor of the unborn children of these children was deemed too remote). The case (*supra*) in 2 Term R. is criticised by Sugden (*ubi supra*) as resting on a misunderstood precedent; but is fully recognized as law. However, in *Beardsley v. Hotchkiss*, 96 N. Y. 201, a will under a reserved power devised a fee to children all unborn at the time of creating the power, with cross remainders over, and the cross remainders were held good. Suppose a stranger should buy land for money from the donee of a power, and direct him to settle it with distant remainders on his own (the purchaser's) family. Mr. Sugden holds that in such cases, and wherever the donee has powers equivalent to a fee, there is no reason to measure the length of future estates from the creation of the power.

⁵ So recognized in the statutes of six named states; in Kent, *ubi supra*; 1 Sugd. Powers, 452; *Jones v. Clifton*, 101 U. S. 225; *Riggs v. Murray*, 2 Johns. Ch. 565. It is here said that in a family settlement powers of revocation are a matter of course. Only in one American case (*Frederick's Appeal*, 52 Pa. St. 338) a power of revocation has been implied, where the owner of an estate without consideration settled it on himself for life, remainder to children, the deed being deemed in the nature of a disposition by will; but the majority of

women are under disabilities, a woman may, before marriage (or after it, with her husband's concurrence), convey an estate to a trustee, reserving powers over it, to be exercised, after marriage, notwithstanding her coverture. Such a power may also be conferred on a married woman by her husband, or by any other person who conveys or devises land to her or for her benefit, or she may obtain such powers even by a mere antenuptial contract with her husband. Such powers have been recognized by courts of equity, just as a naked power of attorney given to a married woman is recognized by courts of law. Hence flows the whole doctrine of what equity lawyers, before the enactment of modern laws removing married women's disabilities, called their "separate estate." There is, however, this difference: While other powers are incompatible with a fee simple in the donee, those implied in a separate estate may accompany the fee of a married woman in the land, enabling her to charge, incumber, or convey it, which otherwise she could not do.⁶ But an infant cannot exercise a power coupled with an inter-

the court receded from this view, perhaps on the special facts, in the late case (1893) of *Reidy v. Small*, 154 Pa. St. 505, 26 Atl. 602.

⁶ "The rule goes further, and even allows an infant to execute a power simply collateral, and that only (i. e. not a power over an estate in which the infant has a pecuniary interest); and a feme covert may execute any kind of power, whether simply collateral, appendant, or in gross, and it is immaterial whether given to her while sole or married. The concurrence of the husband is in no case necessary." Kent, Comm. lect. 62, pl. 3. In Kentucky, since 1852, the statute has hampered the execution by married women of powers of sale or incumbrance over separate estates. See Rev. St. 1852, c. 47, art. 4, § 17; Gen. St. (1873) c. 52, art. 4, § 17,—the former avoiding such powers as to disposition inter vivos altogether; the latter requiring the same concurrence of the husband as to separate, as in the conveyance of "general estate,"—but married women were allowed to devise their separate estates, or to make wills under an express power to that effect (Gen. St. c. 113, § 4), which they may now do generally (Acts 1893). Rev. St. Ind. allow a married woman to alien or devise without the husband's concurrence under a power (section 2984); so Kansas (chapter 114, § 16), and Tennessee (Code, § 3009). In Pennsylvania, before the married women's act of 1848, the doctrine of separate estate was built wholly on that of powers. *Lancaster v. Dolan*, 1 Rawle, 231. In Maryland, Kent's statement above is adopted in *Armstrong v. Kerns*, 61 Md. 364. And so in Illinois before the married women's act. *Swift v. Castle*, 23 Ill. 209. In *Bradish v. Gibbs*, 3 Johns. Ch. 523, before any "married women's act," a devise was held to be authorized by an ante-nuptial

est or estate. He cannot alien what is practically his own property.⁷

The old learning, by which powers were divided into those which are appendant or appurtenant (i. e. to the donee's estate), collateral or in gross (operating only beyond the donee's estate), and simply collateral (given to a donee without any estate in him), was already nearly obsolete, as to practical bearings, when Kent wrote his Commentaries. The Revised Statutes of New York, which for that state abolish the preceding law of powers altogether, define powers⁸ and then divide them in a two-fold way: First, into general and special powers (that is, those in which the donee can dispose of the whole fee or estate coming from the donor to any person whatever, and those under which he can dispose of only a smaller estate or only to persons of a named class); next, into powers beneficial and powers in trust, the former of which are intended only for the donee's own benefit, or, in the words of the statute, "powers in which, by the terms of creation, no one but the grantee is interested" (such as a power of sale or incumbrance, the donee to take and enjoy the proceeds). The latter are those in the exercise of which some person other than the donee is interested.⁹

contract. In *Beardsley v. Hotchkiss*, 96 N. Y. 201, such a contract, made by an infant bride, was held voidable only, and her will was sustained against her heirs.

⁷ Alexander's Case, 27 N. J. Eq. 463 (a person non compos cannot make a will under a power). Where powers are regulated by statute, a person not capable of alienating land (except adult married women, an exception which has generally become needless by the removal of their disabilities) cannot execute a power. New York, Rev. St. pt. 2, c. 1, tit. 2, § 109; Michigan, St. § 5626; Wisconsin, § 2136; Minnesota, c. 44, § 37; Dakota, Civ. Code, § 314. But a power of sale attached to a life estate does not raise it into a fee. *Kennedy v. Kennedy*, 159 Pa. St. 327, 28 Atl. 241.

⁸ "A power is an authority to do some act in relation to lands, or the creation of estates therein, or of charges thereon, which the owner granting or reserving such power might himself lawfully perform." Rev. St. pt. 2, c. 1, tit. 2, § 74. See the same provisions, and others copied from the New York Revised Statutes, in the Statutes of Michigan, c. 215, beginning with section 5591; Wisconsin, beginning with section 2102; Minnesota, c. 44, which is wholly devoted to powers; Dakota (Territorial) Civ. Code, §§ 298, 299.

⁹ In New York this division is contained in chapter and title quoted, sections 76-78, 94, 95. If the power does not fall within any of the heads of the division, it is deemed invalid. A power in a life tenant to make I as is,

The article on "Powers" in the New York statutes has been transferred almost literally, and in all its fullness, to the Codes of Michigan, Wisconsin, Minnesota, the Dakotas, and, in its main features, to that of Alabama.¹⁰ The laws of these states take a plain business view of the nature and effect of a general and beneficial power. It differs in no respect from the ownership over the same property. Hence, where an estate for years or life is given by an instrument, with a general beneficial power, or where a full power of disposition is given, even without any other words creating an estate, the donee thereby takes a fee, "subject to any future estate that may be limited thereon, but absolute in respect to creditors and purchasers."¹¹

for reasons local to New York, restrained to leases for not more than 21 years. This clause has, along with the rest, been copied into the statutes of the Northwest. These statutes speak of "grantor" and "grantee," instead of the older "donor" and "donee"; e. g. "None but the grantee is interested," says the statute; not that "he must be interested." Hence, a general power to appoint by will only is beneficial. *Cutting v. Cutting*, 86 N. Y. 522.

¹⁰ See Minnesota, c. 44; Michigan, c. 215; Wisconsin and the Dakotas, sections quoted in note 4 and sections following; Alabama, Code, §§ 1849-1866. The sections of the statutes common to New York, Michigan, Wisconsin, and the Dakotas will be quoted hereafter from the Minnesota Statutes, where they are grouped in one chapter.

¹¹ "When an absolute power of disposition, not accompanied by any trust, is given to the owner of a particular estate for life or years, such estate shall be changed into a fee, absolute in respect to the rights of creditors and purchasers, but subject to any future estate limited thereon in case the power is not executed or the lands sold for the satisfaction of debts. When a like power of disposition is given to any person to whom no particular estate is limited, such person shall take a fee, subject, etc., but absolute as to creditors and purchasers. In all cases where such power of disposition is given, and no remainder is limited on the estate of the grantee of the power, such grantee shall be entitled to an absolute fee. When a general and beneficial power to devise the inheritance is given to a tenant for life or for years, such tenant shall be deemed to possess an absolute power of disposition, within the meaning [as above]. Every power of disposition shall be deemed absolute by means of which the grantee is enabled in his lifetime to dispose of the entire fee for his own benefit. When the grantor reserves to himself, for his own benefit, an absolute power of revocation, [he] shall still be deemed the absolute owner [as to] creditors and purchasers." These are sections 9-14 in the Minnesota chapter on "Powers"; same language is used in New York, etc. Substantially the same law is found in the Alabama Code, §§ 1849-1853, construed in *Alford v. Alford*, 56 Ala. 350. How a slight ingredient of "in trust"

It would follow that a deed reserving an unlimited right of revocation would be void as against creditors, who might still treat the grantor as the owner, which he is for all practical purposes. And where the donee has a special beneficial power, the statutes of New York and the other five states treat this power as assets for the payment of debts. But this highly equitable doctrine has never been worked out by the English courts, independently of statute,¹² further than this, that where a beneficial power (though to be executed by will only, but which is unlimited, so that no one but the donee is interested) has been actually executed, the donee's creditors may subject the land in the hands of the appointee to the donee's debts; and they have not been followed even herein by the American courts.¹³

will keep the power from becoming an estate liable to the grantee's debts is shown in *Rose v. Hatch*, 55 Hun, 457, 8 N. Y. Supp. 720. A general power of disposition was held a fee in *Ford v. Ford*, 70 Wis. 19, 33 N. W. 188; and, without the aid of a statute, it was held to be an equitable fee in *Sparhawk v. Cloon*, 125 Mass. 263.

¹² *Jones v. Clifton*, 101 U. S. 225. The appellant, the assignee in bankruptcy of the grantor, who had made a deed to his wife with power of revocation reserved, did not and could not claim any precedent for treating the land as being still the grantor's own, as there are no such precedents. He only claimed that the deed was fraudulent as against even subsequent creditors. The court answered that a power of revocation would be a badge of fraud in an "assignment," but was highly proper in a family settlement. The injustice of allowing a person thus to retain or to obtain the real ownership of property, without making it subject to his debts, was one of the main reasons with the New York revisers of 1828 for abolishing the old law of powers altogether. And in New York before the statute, see *Jackson v. Robins*, 16 Johns. 537. In *Cutting v. Cutting*, 86 N. Y. 522, 537, may be found the history of a struggle in the English equity courts to make general beneficial powers over land subject to debt. Equity will not compel a donee to execute, nor enjoin him from assenting to the execution, of a power at the instance of the assignees in bankruptcy, or execution creditors of such donee. *Thorpe v. Goodall*, 17 Ves. 388, 460; *Leggett v. Doremus*, 25 N. J. Eq. 122. See, however, *Johnson v. Cushing*, 15 N. H. 298, where a general beneficial power was held subject to creditors.

¹³ *In Re Harvey's Estate*, 13 Ch. Div. 216, a very late English case, trustees had been appointed by will for a married woman for life, afterwards to hold for such person as she should by will appoint. She did appoint, and the court subjected the property to her debts. It is not a question of fraud. The court held: "She was in the same position as a man; and as, in the case of a man, the property in which he can and does exercise a power of appointment will

And where an estate is given, either for life or generally, by will (and, in states which dispense with words of inheritance, also if given by deed), with words conferring an absolute power of disposition, and there is no limitation over, and no trust, but it clearly appears that the donee may alien for his own benefit, a fee has been adjudged to him without the aid of any statute.¹⁴ And where a defeasible fee is given (e. g. to A. and his heirs, to cease if he die without issue living), with an executory devise over of what "may be left" at the first taker's death, the power of disposition implied in

become liable to his debts, so a married woman having such a power must be treated as if she were a man," etc. Not recognized as law in Wales' *Adm'r v. Bowdish's Ex'r*, 61 Vt. 23, 17 Atl. 1000.

¹⁴ *Waterman v. Greene*, 12 R. I. 485; *Morris v. Phaler*, 1 Watts (Pa.) 389 (liable to debts of person named as life tenant), quoting *Nannock v. Horton*, 7 Ves. 392. Contra, *Funk v. Eggleston*, 92 Ill. 515, where the powers were more formally given; *Dunning v. Vandusen*, 47 Ind. 423, where "to her for life, and to dispose of at her death at her pleasure," was held a life estate only, the power being restricted. The authorities before 1874 are here collected. *Lieve v. Saltingstone*, 1 Mod. 189; *Tomlinson v. Dighton*, 1 P. Wms. 149; *Doe v. Thorley*, 10 East, 438; *Denson v. Mitchell*, 26 Ala. 360, quoting: "The authorities seem generally agreed in this position, that an express estate for life, given by will, negatives the intention to give the absolute property, and converts words conferring a right of disposition into words of mere power." Also quoting 4 Kent, Comm. 319: "A devise of an estate generally or indefinitely, with a power of disposition over it, carries a fee. But, where the estate is given for life, the devisee takes only an estate for life, though a power of disposition or to appoint the fee by deed or will be annexed, unless there should be some manifest intent of the testator which would be defeated by adhering to the particular intent." See, also, on general powers of disposition, *Haslen v. Kean*, 2 Tayl. (N. C.) 279 (the general power not a fee); *Flintham's Appeal*, 11 Serg. & R. 16 (not a fee); *Burwell v. Anderson*, 3 Leigh (Va.) 349 (it is). The words, "She shall have the entire control thereof," confer a fee. *Spurgeon v. Scheible*, 43 Ind. 216. For distinction between power and estate, see, also, *Gilman v. Bell*, 99 Ill. 144. A power of sale gives no right of possession. *Bull v. Bull*, 3 Day (Conn.) 388. But a mere power to encroach on the principal does not turn a life estate into a fee. *Stevens v. Flower*, 46 N. J. Eq. 340, 19 Atl. 777. And in *Payne v. Johnson's Ex'rs*, 95 Ky. 175, 24 S. W. 238, 609, it was held that a life estate with a power to dispose at death by deed or will does not thereby become a fee. When words of inheritance were necessary to make a fee, a distinction was made in wills between a life estate made such by express words and one arising from want of words of inheritance. 4 Kent, Comm. 320.

these words destroys the devise over, and makes the fee of the first taker absolute.¹⁵

The old distinction, by which the estate not otherwise subject to the donee's debts becomes thus subject through the exercise of the power, is done away with in New York and the states which have adopted its statutes. The appointee takes the estate free from the donee's creditors.¹⁶

A power of distribution and selection, given but not executed, when the creative instrument does not limit the estate over in default of appointment, raises a right in the class among whom the distribution should have been made to take in equal shares, and this right, after the time for exercising the power has expired, by the death of the donee or otherwise, has been recognized in some cases even by courts of law, as much as if a grant or devise had been made direct to the members of the class;¹⁷ while in all cases in which the context shows that the words of the power were intended to raise a trust for a known purpose and an ascertained person, a court of equity will enforce such a trust.¹⁸

Where a power is given to a person who already, by other parts of the deed or will, has been vested with a fee, the power is merged in the estate, and will be regarded as not written.¹⁹ By the statute of

¹⁵ Ide v. Ide, 5 Mass. 500; Jackson v. Bull, 10 Johns. 19; Jackson v. Robins, 16 Johns. 537.

¹⁶ Cutting v. Cutting, 86 N. Y. 522. The English distinction allowing creditors to come in when the power is executed is scouted as one of the unreasonable rules which the revisers did away with.

¹⁷ Hoffman v. Hoffman, 66 Md. 568, 8 Atl. 466 (power to sell for division ceases when parties in interest divide); Cruse v. McKee, 2 Head (Tenn.) 1. A single person, and it seems several persons, if all *sui juris* and uniting, for whose benefit land is to be sold, can waive the exercise of the power, and "elect" to take the land (Craig v. Leslie, 3 Wheat. 563); but not after sale is made (Osgood v. Franklin, 2 Johns. Ch. 20; Morse v. Hackensack Sav. Bank, 47 N. J. Eq. 279, 287, 20 Atl. 961). A mortgage of the land by such beneficiary indicates an election. Gest v. Flock, 2 N. J. Eq. 108, 115. This right of the beneficiaries to waive the exercise of the power may remove the objection of a perpetuity. Hetzel v. Barber, 69 N. Y. 1.

¹⁸ 2 Sugd. Powers, 158, 159; Osgood v. Franklin, 2 Johns. Ch. 20, affirmed 14 Johns. 527; Atkinson v. Dowling, 33 S. C. 414, 12 S. E. 93; Berrien v. Berrien, 4 N. J. Eq. 37.

¹⁹ Jennings v. Conboy, 73 N. Y. 230, 237 (where it is said that a power of

Pennsylvania, a power of sale given to executors is turned into an estate. They become, by force of the statute, seised of the land in trust, and the "descent is broken"; but it is doubtful whether a substantial difference results. The executors may grant the estate in their own name, without even disclosing their character, which, where they have a mere power without an estate, is irregular.²⁰

While it is natural that a power which is to be exercised for the sole benefit of certain named persons comes to an end when these persons give up their interest by a suitable deed or other writing, there is also a well developed and established doctrine that the donee of a power appendant or in gross (not a power simply collateral, held by a stranger to the estate) can "release" and thus extinguish the power; which amounts to this, that he can, by a deed to those who would take for want of appointment, disable himself from making an allotment to or among the "objects," taking effect after his own life. But it seems that only a parent having a power of appointment among his own children, which is deemed quasi beneficial to himself, can do so, not one who is restricted to an appointment among strangers, or to charities.²¹ In New York and its sister states this doctrine is unknown, not being found in the statute on powers.

Where a power to sell and reinvest settled lands, upon the same limitations and trusts, is inserted in a deed or will, and is executed by a sale and the investment of the proceeds in other lands, the power is spent; that is, the donee of the power cannot, by reason thereof, sell the newly-acquired land with a view to another reinvestment.²²

devise, if unlimited, is "beneficial"); *Terry v. Wiggins*, 47 N. Y. 516 (to make a fee subject to creditors, both the power to dispose by deed and that to devise must be unlimited). See, also, *McWhorter v. Agnew*, 6 Paige (N. Y.) 111. Full power of disposition during widowhood does not amount to a fee. *Mulberry v. Mulberry*, 50 Ill. 67.

²⁰ See *Shippen v. Clapp*, 29 Pa. St. 265; *Cobb v. Biddle*, 14 Pa. St. 444. A power to the executors is the same as a devise in trust to them. Brightly's Purd. Dig. "Decedent Estates," 78.

²¹ *Thorington v. Thorington*, 82 Ala. 489, 1 South. 716; Thomson's Ex'r's v. Norris, 20 N. J. Eq. 489 (where the English authorities are reviewed). See 1 Sugd. Powers, 99-105; 4 Kent, Comm. 436. *Norris v. Thomson's*

²² *Fritsch v. Klausing* (Ky.) 13 S. W. 241.

§ 117. Validity.

Any person who has capacity to dispose of an estate by deed or will has also the capacity to confer powers of appointment and revocation, or to reserve to himself that of revocation; and he who cannot convey or devise cannot confer a power.²³ The instrument conferring powers, like any other conveyance or devise, may be set aside for fraud or mistake, or may be void for illegality.²⁴ The validity of powers given is, however, often questioned on grounds of public policy; oftenest because the power tends to establish a perpetuity, or because it may be exercised in aid of a perpetuity, which, we have seen, must be measured, not from the execution of the power, but from the time of its creation. It may also come into conflict with laws of mortmain, made for the purpose of preventing the undue accumulation of landed estates in the hands of religious or charitable bodies. Other unlawful purposes of a power over land, than one of these two, will seldom be met with.

A power having for its object to create a perpetuity came before the house of lords in 1763, where, in a strict entail under a will (that is, to A. for life, remainder to trustees, etc., remainder to his eldest son in tail, remainder to his second and every other son in tail), a clause was inserted authorizing trustees, on the birth of each unborn tenant in tail, to revoke the uses limited to them, and to limit the estates to them for their lives, with remainder to their sons in tail. The house, upon the unanimous opinion of the judges, affirmed a decree of the chancellor holding this power to be void, as tending to a perpetuity. In like manner, a power given to sell the estate (whether freehold or leasehold) at some distant time, and to reinvest the proceeds in land, to be then settled afresh with a new life estate, and remainders over, is void; for it would enable the

Ex'rs, 19 N. J. Eq. 307; Atkinson v. Dowling, 33 S. C. 414, 12 S. E. 93; Grosvenor v. Bowen, 15 R. I. 551, 10 Atl. 589.

²³ For the states which regulate powers, see Minnesota, St. c. 44, § 3.

²⁴ In Thomson's Ex'rs v. Norris, 20 N. J. 489, a power to appoint by will to any benevolent, religious, or charitable institution was held void for uncertainty. We cannot see why, as the donee might have made a devise to an institution capable of taking.

donor, by indirection, to tie up the land in a life estate to a still unborn child. These powers are bad in toto.²⁵ But a general power to appoint to children, grandchildren, or issue, without expressing the time within which they must be born, is good, "for the donee may appoint to such only as are within the line."²⁶ Where powers are regulated by statute, the rule to measure perpetuities from the creation of the power is recognized, and no estate can be limited in execution of a power that could not have been limited in its creation, but there are no words in those statutes which declare a power seeking to create a perpetuity to be void throughout.²⁷

In a pretty late American case the power of leasing was given to trustees over land devised to them, with instructions to let the rents be enjoyed successively by the children or descendants of the testator. The court held that the words contemplated a perpetuity,—that is, that grandchildren might be born after the testator's death, and might die, and the trust should still go on,—and as this would amount to an unlawful perpetuity, the power of leasing was held invalid ab initio.²⁸

The New York law against perpetuities forbids the tying up of an estate in the hands of a trustee of an active trust for any term of years, no matter how short, which is not dependent on life or

²⁵ Duke of Marlborough v. Earl Godolphin, 3 Brown, Parl. Cas. 232 (reported there as Spencer v. Duke of Marlborough); s. c., 1 Eden, 404; 1 Sugd. Powers, 178; Ware v. Polhill, 11 Ves. 257 (here the power was to sell and reinvest in strict settlement at any time, with the consent of those entitled to the profits, if of age, and at their discretion, if such persons were under age. Lord Eldon observed that the power of sale might travel through minorities for two centuries. It was bad, and could not be remodeled. Mr. Sugden says the case has been treated as an authority that the common power of sale and exchange is void, as too remote, unless confined to lives in being, and 21 years afterwards; but denies this as being the proper inference. The power is valid when it cannot be used to break up a future estate of inheritance into a strict settlement).

²⁶ Routledge v. Dorril, 2 Ves. Jr. 357.

²⁷ Minnesota, St. c. 44, §§ 54, 55.

²⁸ Barnum v. Barnum, 26 Md. 120, 163. See Wallis v. Freestone, 10 Sim. 225, and remarks thereon (2 Sugd. Powers, 472) to the effect that powers in trustees to sell or exchange, though unlimited in time, are good; for they are understood to come to an end when the beneficial interest rests in fee. But a power subsidiary to a void power is itself void. 2 Sugd. Powers, 158.

infancy. Hence a power in trust to sell after four years, and to pay the proceeds to another trustee for a charitable purpose is void; otherwise, if the recipient had been entitled to the proceeds in his own right, and therefore capable of releasing the power.²⁹

Under the peculiar division of powers made by the laws of New York and its companion states, and the declaration of the statute that none other can subsist, doubts have arisen in some of the reported cases, which have, however, been mostly resolved in favor of validity. Thus it has been held repeatedly that, though an estate in fee be given to a number of devisees, a power of sale vested by the same will in a stranger is valid as a "power in trust," as it may be exercised for their convenience in saving the costs of partition, and still more so when some of them are infants.³⁰ But such a power of sale in the executor has been sustained even where the fee had been devised to the wife alone, to whom the proceeds of sale were to be paid.³¹

Under the statutes of New York, Michigan, etc., a tenant for life can, in the exercise of special and beneficial power (that is, of disposing of less than a fee, and for his own benefit only), make leases for not more than 21 years, and only to commence in possession during his own life; and it has been held that a power to lease for a longer term, or for a term beginning at the life tenant's decease, is void in toto, and cannot be reduced to the lawful limits when the testator granting the larger power has made the scheme of his disposition to depend upon it.³² These statutes also declare powers

²⁹ Garvey v. McDevitt, 72 N. Y. 556. Contra, Hetzel v. Barber, 69 N. Y. 1.

³⁰ Crittenden v. Fairchild, 41 N. Y. 289; Kinnier v. Rogers, 42 N. Y. 531; Battelle v. Parks, 2 Mich. 531; Skinner v. Quin, 43 N. Y. 99, reversing decision of supreme court. And though an active trusteeship, to subsist either for an indefinite or a definite time, independent of lives in being and of infancy, is void under the rule against perpetuities, the power of selling and dividing the proceeds, or of making partition and conveyance, is sustained as a power in trust. Downing v. Marshall, 23 N. Y. 380. See, however, Garvey v. McDevitt, where the intermediate trusteeship for four years rendered the power to convey thereafter to another person in trust for a charity void for remoteness.

³¹ White v. Glover, 59 Ill. 459.

³² Minnesota, St. c. 44, § 15. See Root v. Stuyvesant, 18 Wend. 257, where a power to lease for 63 years was found in a will republished after the Re-

of conveyance or devise valid by which the donee is authorized to dispense with some of the statutory forms of a will or deed, though the dispensing with these forms is inoperative.³³ Where a valid power of sale or appointment is held, it is not lost by the application of the donee for the decree of a court, when that decree turns out to be void for want of jurisdiction in the court, but a sale or appointment will be referred to its true source in the donor's deed or will.³⁴ Under these statutes a "power in trust" can be given only where the purpose is one of those active dealings with the land which the law of states abolishing naked trusts recognizes. But to sell for the benefit of the devisee or beneficial grantee is a proper field of activity for a trustee, and such a power is valid in New York and its sister states.³⁵

§ 118. Construction of Powers.

The powers treated of in this chapter, even when "simply collateral," like those given to an executor in a will, have been much more widely construed, so as to carry out the plain intent of the donor, than those which are given by a letter of attorney; and when the power is coupled with the estate of a trustee, or where land is devised to executors in trust, the construction is still more liberal.³⁶ Thus it has been held both in England and in the United States that a power "to sell and exchange" in a will or deed of trust (though not in a letter of attorney) would include that of making partition be-

vised Statutes, and, being inseparable from the limitations of the will, drew them after itself.

³³ Minnesota, St. c. 44, § 44.

³⁴ *Patton v. Patton*, 39 Ohio St. 590.

³⁵ *Ness v. Davidson*, 45 Minn. 424, 48 N. W. 10, where the trust to pay proceeds of sale to the devisees was implied, none other being named.

³⁶ *Rowe v. Lewis*, 30 Ind. 163; *Rowe v. Beckitt*, Id. 154 (under powers coupled with an interest, substantial compliance is enough). See *Jeffersonville Ass'n v. Fisher*, 7 Ind. 699, as to what constitutes power coupled with an interest. Contra, as to naked power, *Welch v. Louis*, 31 Ill. 446. The liberality of construction is best shown in the cases quoted in the following notes. A power to put the testator's firm interest into a corporation authorizes a deed of conveyance to the corporation when formed. *Ballantine v. Frelinghuysen*, 38 N. J. Eq. 266.

tween the part owners of the estate.³⁷ But where a power is given in a will, the whole instrument must be read together, as well to restrict as to enlarge the authority given.³⁸ By far the most frequent, and thus the most important, power over land given by wills or family settlements and other deeds of trust in this country is the power of sale. Often it is given by implication; duties being imposed on an executor or trustee which can plainly not be performed without the previous sale of the land. If such a fiduciary is to divide property, pay from time to time the income or dividends to the devisees of undivided shares, and still more when he is to pay the principal of these shares, or when he is to support a cestui que trust, and in order to do so is authorized to encroach on the body or capital of the estate, he cannot do so without a sale, and therefore may sell; and the implication is even stronger where a will throws the realty and personality into one mass, thus indicating that the executor should deal with one as he would deal with the other.³⁹

³⁷ *Phelps v. Harris*, 99 U. S. 370 (where, however, there was a power "to dispose of"), quoting the discussion of the point in 2 Sugd. Powers, 479, and the recent English case *In re Frith*, 3 Ch. Div. 618, where Sir George Jessel, M. R., took the final step, after several hesitating opinions of earlier judges, to the effect that a power to sell and exchange authorizes a partition between two or more part owners. See, also (case between same parties), *Phelps v. Harris*, 51 Miss. 789. Under a power to sell and divide the proceeds, partition may be made in kind. *Anderson v. Butler*, 31 S. C. 183, 9 S. E. 797. But in *Re Carr*, 16 R. I. 645, 19 Atl. 145, a trustee holding a power over an undivided share of land, "to sell and dispose of," was held incapable of assenting to a partition out of court, while a partition in pais under a like power was sustained in *King v. Merrill*, 67 Mich. 194, 34 N. W. 689.

³⁸ *Smyth v. Taylor*, 21 Ill. 294. Power to sell "at any time" was held to be gone when the purpose stated in the will for making sale had become impossible. In *Kaufman v. Breckenridge*, 117 Ill. 305, 7 N. E. 666, a power was construed to take effect rather on the donee's estate than on the remainder. Contra, *Brown v. Brown*, 31 N. J. Eq. 422, where a power to sell for debts and legacies was held not to be restricted as to time by a general power in the same will to sell after widow's death. See, further, under the head of "Time of Execution."

³⁹ *Belcher v. Belcher*, 38 N. J. Eq. 126, quoting *Van Ness v. Jacobus*, 17 N. J. Eq. 153; *Wurts' Ex'rs v. Page*, 19 N. J. Eq. 365; *Haggerty v. Lanterman*, 30 N. J. Eq. 37; *Zabriskie v. Morris & E. R. Co.*, 33 N. J. Eq. 22. Also, *Ames v. Ames*, 15 R. I. 12, 22 Atl. 1117, relying on *Hill, Trustees*, § 471; 1 Sugd. Powers, 513; 2 Perry, Trusts, § 766. No particular form of words is neces-

Thus, a devise to a widow or daughter for life is often followed by a devise in remainder of "what is left," "what may then remain," or the still stronger words, "if anything is left." Unless the life estate is mainly of personal property, and unless it appears from the context that only this kind of property is to be consumed, a power of sale is naturally implied.⁴⁰ But a power to manage and repair, or

sary to create a power of sale. Any words which show an intention to create such a power, or any phrase which imposes duties upon the trustee which he cannot perform without a sale, will necessarily create a power of sale in the trustee. Followed in *Hollman v. Tigges* (N. J. Ch.) 7 Atl. 347; also, in Massachusetts, *Goodrich v. Proctor*, 1 Gray, 567 (trust for the payment of debts); *Purdie v. Whitney*, 20 Pick. 25 (trust to invest and reinvest). In New York, a direction to invest the estate in bonds implies a power of sale. *Byrnes v. Baer*, 86 N. Y. 210; *Coogan v. Ockershausen*, 55 N. Y. Super. Ct. 286 ("to pay promptly all debts, residue to executors in trust"). In Pennsylvania, a power of sale in the executor was implied in *Ex parte Elliott*, 5 Whart. (Pa.) 524, from the bequest of a yearly sum "out of my estate at ——"; "no particular form of words," *Gray v. Henderson*, 71 Pa. St. 368. In New York, a power to repair and improve was in one case (not in the court of appeals) held to authorize a mortgage on the land to be improved. *Wetmore v. Holzman*, 23 How. Prac. 202. Where land is not divisible, a direction to the executors to divide the whole estate implies the power and duty of selling. *Venable v. Mercantile Trust & Deposit Co.*, 74 Md. 187, 21 Atl. 704. Reference to former trust includes power of sale given in aid of it in former deed. *Goodrich v. Proctor*, 1 Gray (Mass.) 567. Where legacies were charged on a lot, to be paid by executor, he had power to sell it, though his testatrix herself only devised under a power. *Whitehead v. Wilson*, 29 N. J. Eq. 396. (*Seeger v. Seeger*, 21 N. J. Eq. 90, to the contrary, is, in effect, overruled by later New Jersey cases.) "I sell my house to A. B. on paying \$—— to my executor," in a will, empowers the executor to convey at that price. *Jones v. Jones*, 13 N. J. Eq. 236. A request that the executors should not sell in any but a prescribed way, or at a named time, implies a power to sell thus and then. *Steward v. Hamilton*, 37 Hun. 19.

⁴⁰ *Henderson v. Blackburn*, 104 Ill. 227, arguendo; *Clark v. Middlesworth*, 82 Ind. 240, if anything should remain; followed in *Silvers v. Canary*, 109 Ind. 267, 9 N. E. 904; *Paine v. Barnes*, 100 Mass. 470. Contra, when personality is also bequeathed, the words "what is left" may refer to this only. *Blanchard v. Blanchard*, 1 Allen (Mass.) 223; *Roberts v. Lewis*, 153 U. S. 367, 14 Sup. Ct. 945, following, as to local law, *Little v. Giles*, 25 Neb. 313, 41 N. W. 186. For the effect of these words on a defeasible fee, see section 116, note 15. 1 Sugd. Powers, 471, 496. Where these words are added to a devise during widowhood, the presumption is against the power of sale. *Giles v. Little*, 104 U. S. 291. Contra, *Levengood v. Hoople*, 124 Ind. 27, 24

even to improve, does not carry with it one of selling part of the land to repair and improve the rest.⁴¹

A general power of appointment, or of consenting to an appointment by deed, given for the donee's own benefit (and such it always is when the objects are not limited), may be exercised by a deed of settlement, transferring the fee or some lesser estate for the benefit of the donee;⁴² and a power to sell or incumber for the benefit of creditors is well exercised by a sale or mortgage to them direct.⁴³ The rule has been adopted in all states other than Pennsylvania that a power to sell, without words either qualifying or restraining it, whether in a deed or in a will, does not authorize the donee to mortgage the lands; the old theory that a mortgage is nothing but a conditional sale being exploded, and the object of the donor being presumably the full conversion of the land into money at a fair price.⁴⁴ Neither does a power of sale authorize an exchange of

N. E. 373. But a direction that the estate shall go over in the shape in which it is at the death of the life tenant implies no power of sale. *Wilson v. Wilson*, 46 N. J. Eq. 321, 19 Atl. 132.

⁴¹ *Roe v. Vingut*, 117 N. Y. 204, 22 N. E. 933. To rent out a house, and otherwise to arrange for a person's support, does not authorize a sale. *Booraem v. Wells*, 19 N. J. Eq. 87. And a power to divide is not a power to sell. *Craig v. Craig*, 3 Barb. Ch. 76. A power to invest funds in land was held to include a power to mortgage for part of the purchase money. *Gernert v. Albert*, 160 Pa. St. 96, 28 Atl. 576; but, quære, is it an investment to buy on credit? To invest does not include that of mortgaging other trust property for the price. *Green v. Claiborne*, 83 Va. 386, 5 S. E. 376.

⁴² *1 Sugd. Powers*, 471, 496; *Boyd v. Satterwhite*, 10 Rich. (N. S.) 45, where the power was beneficial and she dealt with it by marriage settlement to herself for life, remainder to her husband; *Hicks v. Ward*, 107 N. C. 392, 12 S. E. 318, where it might have been thought that the power was one of selection, but the donee raised money by mortgage. A direct appropriation by the donee was sustained in *Beck's Appeal*, 116 Pa. St. 547, 9 Atl. 942.

⁴³ *Magraw v. Pennock*, 2 Grant, Cas. (Pa.) 89; *Stokes v. Stokes*, 66 Miss. 456, 6 South. 155.

⁴⁴ *Willis v. Smith*, 66 Tex. 31, 17 S. W. 247 ("The power to sell did not authorize the execution of the deed of trust [meaning a mortgage]. Jones. Mortg. § 129"). *Kinney v. Matthews*, 69 Mo. 520, where the power of sale was given in order to invest the proceeds in other lands, to be secured to donee and her children; and the court admitted that if the power had been "unrestricted," meaning that it was only for the donee's own benefit, it might have authorized a mortgage, as nobody could have been prejudiced by

lands; as selling means to part with a thing for money.⁴⁵ In deeds to the trustees of a church or charity a power of sale has sometimes been inferred from slight intimations; such as a habendum "to the trustee and his assigns." In New York an order from the supreme court upon good ground shown, under the statute, supplies the necessary power.⁴⁶ However, when the avowed object of the donor in conferring the power of sale is to pay debts or to clear off a charge on the estate, and it is devised subject to such debts or charge to the grantee of the power in trust, an authority to mortgage the lands in the discretion of the trustee has been implied in some cases, both English and American.⁴⁷ We have found no case in which the sale by the donee of a power was questioned, when he

the result. *Hoyt v. Jaques*, 129 Mass. 286, though the power was given to the donee to sell for as much "as may be sufficient for his comfortable maintenance," and where the distinction between power of sale and of mortgage is put on the same ground as in a mere letter of attorney. *Stokes v. Payne*, 58 Miss. 614, though the Mississippi statute empowering married women to sell land has been construed to include mortgages. *Albany Fire Ins. Co. v. Bay*, 4 N. Y. 9; *Head v. Temple*, 4 Heisk. (Tenn.) 34; *Willis v. Smith*, 66 Tex. 31, 17 S. W. 247; *Hubbard v. German Catholic Congregation*, 34 Iowa, 31, is often quoted in this connection, but is the case of a mere power of attorney given by a corporation to a committee. So, also, *Ferry v. Laible*, 31 N. J. Eq. 566 (reversed in 32 N. J. Eq. 791, on other grounds). *Loring v. Brodie*, 134 Mass. 453 (pledge of personality under power of sale), is in point. *Contra in Pennsylvania*; *Lancaster v. Dolan*, 1 Rawle, 231, the leading case, following *Mills v. Banks*, 3 P. Wms. 9 (mortgage a conditional sale); approved in *Presbyterian Corporation v. Wallace*, 3 Rawle, 109; *Gordon v. Preston*, 1 Watts, 386 (where a power to sell given by charter is construed); *Zane v. Kennedy*, 73 Pa. St. 182, 192, where this view is called a "rule of property" for Pennsylvania, beyond the power of the courts to change. So again in *McCreary v. Bomberger*, 151 Pa. St. 323, 24 Atl. 1066.

⁴⁵ *Columbus Banking & Ins. Co. v. Humphries*, 64 Miss. 258, 277, 1 South. 232; *Fleischman v. Shoemaker*, 2 Ohio Cir. Ct. R. 153.

⁴⁶ *Olcott v. Gabert*, 86 Tex. 121, 23 S. W. 985. See, also, *Blanc v. Alsbury*, 63 Tex. 490; *Farnham v. Thompson*, 34 Minn. 332, 26 N. W. 9.

⁴⁷ Argued in *Hoyt v. Jaques*, 129 Mass. 286, quoting *Ball v. Harris*, 4 Mylne & C. 264; *Devaynes v. Robinson*, 24 Beav. 86; *Bloomer v. Waldron*, 3 Hill (N. Y.) 361; *Loebenthal v. Raleigh*, 36 N. J. Eq. 169 (on the ground that the value of the land much exceeded the sum to be raised). In *Kent v. Morrison*, 153 Mass. 137, 26 N. E. 427, the donee was allowed to mortgage, as she had under the power the right to sell, for any purpose, and to use the proceeds.

sold on the usual credits, taking a mortgage or reserving a lien in the usual way for the deferred portions of the purchase money; and it has even been held that a sale made partly for cash and partly in consideration of a demand on a third person was not invalid for want of authority.⁴⁸

However, a sale does not mean a gift, though, where the donee has an unlimited power for his own benefit, a deed for a nominal consideration might be sustained; and, on the other hand, the power to make a gift does not authorize a sale.⁴⁹ A power given to a life tenant to dispose of a fund at her death is not always restricted to a devise. The context may show that an alienation by deed was contemplated,—that the life tenant could not otherwise obtain the benefit intended for her.⁵⁰

Where, from the language of a power of sale or appointment, its extent rests in doubt, some part of the testator's or grantor's property being excluded, the interpretation has generally been rather liberal, and the power is never to be defeated by a literal, but too wide, interpretation of restrictive words.⁵¹ Powers, especially those of sale, are often accompanied by words indicating the object for which a sale or conveyance is to be made; as for the payment of debts or of legacies, the settlement of the estate, for the comfortable support of the widow, etc. It is often difficult to tell whether the necessity of reaching these objects is meant to be a condition

⁴⁸ *Shippen's Heirs v. Clapp*, 29 Pa. St. 265.

⁴⁹ *Shank v. Dewitt*, 44 Ohio St. 237, 6 N. E. 255; *Marshall v. Stephens*, 8 Humph. (Tenn.) 159, where, however, in favor of a purchaser, it was presumed that a lost deed was, as it should have been, a deed of gift. *Hoyt v. Hoyt*, 17 Hun (N. Y.) 192.

⁵⁰ *Fairman v. Beal*, 14 Ill. 244; *Christy v. Pulliam*, 17 Ill. 59; *Doolittle v. Lewis*, 7 Johns. Ch. 45, where the benefit of the power might have been lost unless a conveyance was permitted.

⁵¹ *Stephens v. Milnor*, 24 N. J. Eq. 358; *Provost v. Provost*, 27 N. J. Eq. 296; *White v. Guthrie* (Ky.) 8 S. W. 274 (in these two cases the phrase "except land devised" was construed "except land specifically devised," so as not to defeat the power); *Hemhauser v. Decker*, 38 N. J. Eq. 426, however, holds that to sell "the balance of my property" does not include a lot devised, but refused by the devisee. *Beeson v. Breading*, 77 Pa. St. 56. In *Isaacs v. Swan*, 1 Duv. (Ky.) 277, the residue, subject to power of sale, was held to include the estate in remainder in a tract devised for life; s. p., in *Hairston v. Dobbs*, 80 Ala. 589, 2 South. 147.

precedent, or whether the donor only states his motive for granting the power, leaving the donee to use his discretion. When the former view is taken, the deed purporting to be made under the power might turn out void, even in the hands of a purchaser in good faith.⁵² Where a power is given to executors or trustees to sell for the payment of debts, the sale has been held void, both at common law and under the New York statute, if there were no debts, on the ground of the existence of debts being a condition precedent.⁵³ It is difficult to reconcile the cases; but there are certainly some clear distinctions. Thus, a power given to sell for the settlement of the estate must needs be exhausted when the debts and legacies are paid; and the executor or other donee of the power could not sell the surplus for distribution among the cestuis que trustent. But when a widow is authorized to sell part of the land, if the income should not be sufficient for her "comfortable" support, it is not easy to decide whether the occasion has arisen, and very hard on a purchaser in good faith to impeach his title because she might have lived comfortably, in the opinion of the court, without the sale.

⁵² The leading case is *Dike v. Ricks*, Cro. Car. 335, on the side of the condition precedent; and see 1 Sugd. Powers, 329. The first American case is *Minot v. Prescott* (1780) 14 Mass. 496. Power of sale given "in case my property cannot be satisfactorily divided" ceases when the devisees agree on a division. *Chasy v. Gowdy*, 43 N. J. Eq. 95, 9 Atl. 580, following *Howell v. Sebring*, 14 N. J. Eq. 84. "To sell as the proper and convenient settlement of the estate may require" does not allow sale for division. *Allen v. Dean*, 148 Mass. 594, 20 N. E. 314. "If income not sufficient to support her comfortably," the sale was held void in a real action against purchaser for failure of condition. *Minot v. Prescott*, *supra*; but note the word here is "if." Under a power to sell for necessities of children, a sale to relieve a daughter-in-law was refused. *Rathbun v. Colton*, 15 Pick. (Mass.) 471. When the purpose of the sale is otherwise provided for, even a power to sell "at any time" is gone. *Hamilton v. Crosby*, 32 Conn. 342 (trustee with power to sell for child's support may sell to reimburse himself for outlays already made). In *Scheidt v. Crecelius*, 94 Mo. 322, 7 S. W. 412, a deed made by the life tenant under power to sell when necessary for her support was held void for want of necessity. See, also, for bad faith, *Hull v. Culver*, 34 Conn. 403; *Campbell v. Johnson*, 65 Mo. 439 (donee not deemed sole judge of necessity); *Stevens v. Winship*, 1 Pick. (Mass.) 318 (also case of a sham sale).

⁵³ *Sweeney v. Warren*, 127 N. Y. 486, 28 N. E. 413. The power is "in trust" under the New York statute, and falls to the ground when the purpose for which such powers are authorized by the statute fails.

In such cases a previous application to a court for leave to sell is most advisable; and no one should otherwise buy land under such a power.⁵⁴

A power to devise has been implied in the taker for life from a limitation over in case he should die intestate.⁵⁵

The courts will not ingraft exceptions upon a power. Thus, where a separate estate is settled upon a woman, with power of appointment by will, or by will or deed, though the leading object be to secure her in the property as against her husband, she may devise it all to her husband, or may sell or mortgage it for the payment of his debts.⁵⁶ And when the donee is empowered to divide an estate among children it does not follow that each must have a fee simple in his share, but a life estate or base fee may be given to one in the whole or any part, and a remainder or executory devise to the others,⁵⁷ as long as no part is given to one not of the class.⁵⁸ In like

⁵⁴ Though a chancery court cannot impart power to sell real estate where none is given by the owner (*Burroughs v. Gaither*, 66 Md. 171, 7 Atl. 248), yet it can, by its decree in a suit to which all persons in interest are parties, find and adjudge that the power exists.

⁵⁵ *Shoofstall v. Powell*, 1 Grant. Cas. (Pa.) 19. Compare note 40, supra.

⁵⁶ *New v. Potts*, 55 Ga. 420; *Coryell v. Dunton*, 7 Pa. St. 550, following *Hoover v. Samaritan Society*, 4 Whart. 445.

⁵⁷ *Beardsley v. Hotchkiss*, 96 N. Y. 201, 218, quoting 2 Sugd. Powers, 294, where executory devises in the nature of cross remainders were given.

⁵⁸ *Austin v. Oakes*, 117 N. Y. 577, 23 N. E. 193 (where a donee attempted, under a power to appoint among children, to give a share to grandchildren, some children having died); *Seibels v. Whatley*, 2 Hill, Ch. (S. C.) 605 (where the selection among children was not enlarged by the words "in such manner as she may choose"); *Safe-Deposit Trust Co. v. Meyers*, 73 Md. 413, 21 Atl. 58 (a power of appointment among children and grandchildren does not authorize life estates to "the objects," with remainders to their wives and children); though in *Torrance v. Torrance*, 4 Md. 12, a direction to secure to the daughters their shares free from the control of their husbands was held to justify deeds to the daughters for life with remainder over. A provision for grandchildren was also disallowed in *Welsch v. Belleville Savings Bank*, 94 Ill. 191 (under a power to allot among children). But "issue" embraces grandchildren. *Drake v. Drake* (Sup. Ct.) 3 N. Y. Supp. 760. In Alabama, by statute (Civ. Code 1886, § 1862), a power of selection among children embraces grandchildren (see *Collins v. Toomer*, 69 Ala. 14); and a power to sell or to devise generally the donor's lands includes estates in remainder as well as those in possession (*Hairston v. Dobbs*, 80 Ala. 589, 2 South. 147).

manner, where the will or deed creating the power of sale does not indicate that a fair price must be obtained, and certainly where none but the donee is interested in the proceeds of sale, a life tenant having the power has been allowed to sell the estate in remainder after her own death, dividing in point of time what she might have divided in space.⁶⁹

Generally speaking, the power to appoint an estate in fee includes that to appoint a lesser estate, unless the contrary intent plainly appears.⁷⁰

It has been laid down as a rule that where a grantor reserves the power of revocation within restrictions, these restrictions ought to be considered narrowly, so as to widen his power over what was his own; but where restrictions are put upon the power of a grantee they ought to be liberally construed, so as to narrow the power.⁷¹ But it would seem that a narrow construction should never be applied when it might defeat a purchaser for value and in good faith under a power of sale. And powers, like other parts of a will, must be construed with a view to the state of facts at the time of the testator's death.⁷²

Where a power of sale is excepted from general powers of management, a lease for a term much exceeding the expectation of human life, or beyond the term for which lands are habitually leased, would seem an evasion, though the precedents are not uniform.⁷³

NOTE. Many of the late cases on the construction of powers, especially in Massachusetts, have been brought before the court, not in a contest with parties claiming the land in hostility to the power, or to its execution, but on objections by a purchaser to the title derived or to be perfected, under a questionable construction of the power. Perhaps some decisions might have been different if a more earnest effort had been made to defeat the title gained under the power. Such cases are *Carroll v. Shea*, 149 Mass. 317, 21 N. E. 373; *Dodge v. Moore*, 100 Mass. 335; *Hale v. Marsh*, Id. 468.

⁶⁹ *Butler v. Huestis*, 68 Ill. 594.

⁷⁰ 1 *Sugd. Powers*, p. 535, § 40.

⁷¹ *Imlay v. Huntingdon*, 20 Conn. 169.

⁷² *Kip v. Hirsh*, 103 N. Y. 565, 9 N. E. 317 (to sell my vacant lots means those which are vacant at the time of the testator's death).

⁷³ *Duke of Queensbury's Case*, 2 Dow, 90; Id. 285; 5 Dow, 293 (upon leases for 99 and 57 years respectively). Contra, *Black v. Ligon*, Harp. Eq. (S. C.) 205.

§ 119. Execution—By Whom.

Before determining whether a power is rightly executed, the question often arises, who can execute it? generally in one of the following forms:

First. When a power is conferred upon several executors or several trustees, and some of them have died, or have refused to act, can the remaining executors or trustees act? And so, if the consent of several persons in interest has been made a condition precedent, can the survivors, by their consent, fulfill the condition?

Second. When a power is conferred in a will upon a person who is named executor therein, does the power attach to the person, or to the office? And, in connection herewith, when can a power given to the executor be exercised by an administrator with the will annexed?

Third. Where no one is expressly named as donee, shall the power fail, or will the law indulge in a presumption, say in favor of the executor?

These are not, however, the only questions that arise. - At common law, where a power was given to several persons, whether by name, or in their character as executors, it could never be executed by any smaller number, though part of those named had died, or had refused to accept the trust; it being supposed that the donor was unwilling to lodge the discretion in any smaller number. But St. 21 Hen. VIII. c. 4, which passed into the American colonies as part of the common law, provided that, where lands are willed to be sold by executors, all sales by the executors that accept the administration shall be as valid as if all had joined.⁶⁴ But neither at common law, nor under the statute of Henry VIII., can the majority of

⁶⁴ 1 Sugd. Powers, 144. The statute of Henry VIII. is part of the law of Illinois (Clinefelter v. Ayres, 16 Ill. 329; Ely v. Dix, 118 Ill. 477, 9 N. E. 62). where it must have passed through Virginia. It applies whether a naked power be given or the land be devised to the executors; whether mandatory or discretionary. Wardwell v. McDowell, 31 Ill. 364. So, also, in Pennsylvania, where by statute every power of sale given to executors confers the estate on them. Cobb v. Biddle, 14 Pa. St. 444. See, also, Peter v. Beverly, 10 Pet. 532; Randall v. Phillips, Fed. Cas. No. 11,555; Petition of Bailey, 15 R. I. 60, 1 Atl. 131 (strong case). Where power is conferred on A. to sell

executors or trustees of a private trust execute the power intrusted to them as the majority of the members of a public official board might do. Mr. Sugden lays down the rule as it stood in his time, without aid from modern statutes, thus:

1. Where a power is given to two or more by their proper names, who are not made executors, it will not survive, without express words.
2. Where the authority is given to "executors" and the will does not point to a joint exercise of it, even a single surviving executor may execute it.
3. Where it is given to them nominatim, although in the character of executors, yet it is at least doubtful whether it will survive.

On our third question he states the rule thus: Where the testator directs his estates to be sold for certain purposes, without deciaring by whom the sale shall be made, "if the fund be distributable by the executor, he shall have the power [of sale] by implication."⁶⁵

In the United States, while these positions are still good law, in

with the consent of B., or with the consent of a named court, it is in effect a power to both, and A. alone cannot execute it. *Bates v. Leonard*, 99 Mich. 296, 58 N. W. 311.

⁶⁵ 1 Sugd. Powers, 144. Mr. Sugden, and Lord Coke before him, advised the draftsmen of wills in all cases to add the words "or the survivor or survivors of them" to the designation of the donees of powers, to avoid the delicate questions which might arise. See, for general rule that private powers given to several must be exercised by all, *Marks v. Tarver*, 59 Ala. 335. That several executors who have qualified and are in office must join in a sale or appointment is fully recognized. *Neei v. Beach*, 92 Pa. St. 221; *Noel v. Harvey*, 29 Miss. 72, where two out of three executors, though joining in the deed, were not counted, as they were the purchasers. See also a like case in *Thorp v. McCullum*, 1 Gilm. (Ill.) 615; *Crowley v. Hicks*, 72 Wis. 539, 40 N. W. 151 (two executors willing to sell, the third cannot be compelled to join); and this was extended in *Morville v. Fowle*, 144 Mass. 109, 10 N. E. 766, to the three trustees of a Sabbath school endowed by will with a power of exchange. And so as to several partners acting upon land. *Cummings v. Parish*, 39 Miss. 412. But, where a survivor properly acts, he need not in his deed recite the death of the others. *Cowles v. Reavis*, 109 N. C. 417, 13 S. E. 930. The further point held in the case, that such deed is *prima facie* proof of the other donee's death, is hardly good law. Two executors have power, one is removed, the other may act (*Denton v. Clark*, 36 N. J. Eq. 534); though the power be discretionary (*Weimar v. Fath*, 43 N. J. Law, 1).

the main, the power of a smaller number of nominees,—the others having died, or refused to act,—has generally been enlarged, both by legislation and by the course of decision; and in some states the statute has in all cases, or at least wherever the sale is imperative, and personal confidence in the particular executor's discretion is not clearly shown, cast the execution of testamentary powers over land on the administrator with the will annexed; the same section of the statute covering the whole ground.⁶⁶ In New York, and the states

⁶⁶ So in Kentucky (Gen. St. c. 39, art. 1, § 13; now chapter 156 of acts of 1893, art. 2, § 56), not only when the power is mandatory (*Gulley v. Prather*, 7 Bush,^{*} 167), but also where it is discretionary (*Shields v. Smith*, 8 Bush, 601, in conformity with the modern statute). But when such administrator is removed his powers cease, and a sale by him thereafter is void. *Owens v. Cowan*, 7 B. Mon. 152. In the older case of *Brown v. Hobson*, 3 A. K. Marsh. 380, where executors were to sell, if proper in their opinion, it was thought that an administrator c. t. a. could not act. In Maryland, under Gen. Pub. Laws, art. 93, §§ 282, 283, either an executor or an administrator c. t. a. must have leave from the probate court, and the latter can sell where the will directs a sale, for instance, where the property is to be divided, and the land is not divisible. See *Carter v. Van Bokkelen*, 73 Md. 175, 20 Atl. 781; *Venable v. Mercantile Trust & Deposit Co.*, 74 Md. 187, 21 Atl. 704. So in New York, but only when the sale is mandatory. *Farmers' Loan & Trust Co. v. Eno*, 35 Fed. 89 (where the executor had contracted the sale and died); *Greenland v. Waddell*, 116 N. Y. 234, 22 N. E. 367. The same rule prevails in New Jersey (*Joralemon's Adm'r v. Van Riper*, 44 N. J. Eq. 299, 14 Atl. 479, mandatory power passes. And see *Griggs v. Veghte*, 47 N. J. Eq. 179, 19 Atl. 867, under act of 1888; *Stoutenburgh v. Moore*, 37 N. J. Eq. 68, discretionary does not); Indiana (Rev. St. § 2359, includes an administrator c. t. a.). See *Davis v. Hoover*, 112 Ind. 423, 14 N. E. 468, following the stronger case of *Landers v. Stone*, 45 Ind. 404; and North Carolina (*Gay v. Grant*, 101 N. C. 206, 8 S. E. 99, 106, discretionary does not; Code, § 1493; *Orrender v. Call* [N. C.] 7 S. E. 878); Iowa (Revision, § 2335, enforced in *Lees v. Wetmore*, 58 Iowa, 171, 12 N. W. 238); also Oregon (Code, § 1155. See *Northrop v. Marquam*, 16 Or. 173, 18 Pac. 449); and this is implied by section 1971 of the Revision of South Carolina. In this state and in Iowa, the administrator c. t. a. is considered as an "appointed" executor. The New Jersey decisions on the point which words in the will do and which do not express particular faith in the executor, so as to exclude the administrator c. t. a., viz. *Lanning v. Sisters of St. Francis*, 35 N. J. Eq. 392, *Naundorf v. Schumann*, 41 N. J. Eq. 14, 2 Atl. 609, and *Giberson v. Giberson*, 43 N. J. Eq. 116, 10 Atl. 403, are too intangible in their distinctions. Connecticut allows (Gen. St. § 554) the remaining executors or administrator c. t. a. to act when a sale is "authorized or directed" which would include

which have copied from it, "when a power is vested in several persons, whether executors or not, all must unite in its execution; but if, previous to such execution, one or more of such persons shall die, the power may be executed by the survivors"; all the distinction between executors and others, or between named persons and a class of persons, being put aside.⁶⁷

Where a power is conferred on named persons in one clause of the will, or the estate is devised to such persons in trust, with an authority to sell or appoint, and by a subsequent clause of the will they are made executors, or whenever the will in any way otherwise indicates that the power is conferred on "the person named as executor," and not on the executor as such, it is the better opinion that the power is personal, and neither the statute of Henry VIII. allowing the surviving executor to act, nor those local statutes or usages, would apply, which transfer the power given to the executor over the testator's land to an administrator with the will annexed.⁶⁸ This is treated in some states as a question of intention, each will standing on its own bottom, and the decisions can hardly be reconciled. In other states the courts have gone very far in holding that every power of sale, whether it be mandatory, so as to work at once an equitable conversion, or be left in the discretion of the executors,—whether to be executed at once, or after a stated event,—is given to the executors *virtute officii*; and it can, in Pennsylvania at least, make no difference that the estate is devised to the executors, as, under the statute, such would be the effect even discretionary as well as imperative powers; but the section, closely read, leaves more than one *casus omissus*. Delaware, Laws, c. 90, § 17, seems to cover every possible case, provided the will does not expressly provide the contrary; Texas, Code, art. 3138, subd. 5, is passed on in *Anderson v. Stockdale*, 62 Tex. 59, and *McDonald v. Hamblen*, 78 Tex. 628, 14 S. W. 1042. Power to "executors or whoever may act" is on its face not personal, and passes to appointee of court. *Royce v. Adams*, 123 N. Y. 402, 25 N. E. 386.

⁶⁷ See Minn. St. c. 44, § 39. This seems to cut off all questions between mandatory (or imperative) and discretionary powers; but the power may, by express words, come to an end on the death of one of the joint donees. *Hyatt v. Aguero* (Super. N. Y.) 1 N. Y. Supp. 339.

⁶⁸ *Brown v. Hobson*, 3 A. K. Marsh. (Ky.) 380; *Wilder v. Ranney*, 95 N. Y. 7; quoting *Berger v. Duff*, 4 Johns. Ch. 368. In Iowa (Code, §§ 2332, 2333), those appointed by the probate court to execute the will are called "executors," and naturally have all the powers of such.

of a naked power. Many decisions defeat the limiting words of a power which make a sale depend on the condition that it be deemed proper by the men whom the will names as executors.⁶⁹

Where the number of executors is lessened by death, or by resignation or renunciation, or that of other donees by death, the smaller number can only act after such reduction; in other words, the imperfect execution by less than all who ought to have concurred cannot be cured by the subsequent death or incapacity of the others. However, the remaining or surviving executor or trustee can afterwards, by ratifying the execution, give it life and force.⁷⁰

It has been held, at least in one case, where one of several executors had for a great number of years taken no part in the management of an estate, that this nonaction might be treated as a renunciation, though he had never renounced in open court, or even in writing, and the act of the only active executor was upheld.⁷¹ On the other hand,—also in favor of a sale made in good faith,—a resignation actually entered in court was disregarded on the ground that the court had no right to accept it, and the subsequent act of the trustee so resigning was sustained.⁷²

Courts often remove and appoint fiduciaries, and thus transfer or locate powers given by deed or will. Trustees are appointed and removed by courts having general equity jurisdiction, such as the supreme court in New York; executors, by the probate court, which bears different names in different states. Which court shall appoint, must depend on the general law, not on the choice of the

⁶⁹ *Lantz v. Boyer*, 81 Pa. St. 325, quoting *Evans v. Chew*, 71 Pa. St. 47, denies all distinctions. What is or is not discretionary power, and therefore will not or will pass to the acting executor, where the distinction is maintained, is fully illustrated in *Jones v. Fulghum*, 3 Tenn. Ch. 198. For an example of a power not personal see *Bradford v. Monks*, 132 Mass. 405; *In re Van Brocklin*, 74 Iowa, 412, 38 N. W. 119, which is distinguished from *Lees v. Wetmore*, 58 Iowa, 171, 12 N. W. 238. In *Coleman-Bush Inv. Co. v. Figg* (Ky.) 25 S. W. 888, a power of sale given by will to a trustee was allowed to be carried out by his successor, appointed by the chancery court.

⁷⁰ *Neel v. Beach*, 92 Pa. St. 221. A case is quoted 1 Sugd. Powers, 140, where a power was given to the survivor of two, and could not be executed till one had died. *Shippen v. Clapp*, 29 Pa. St. 268.

⁷¹ *Veazie v. McGugin*, 40 Ohio St. 365.

⁷² *Marr v. Peay*, 2 Murph. (N. C.) 84; *Veazie v. McGugin*, supra.

donor who creates the power. He cannot confer jurisdiction.⁷³ In the District of Columbia, under the Maryland statute of 1785, a trustee substituted by a court cannot sell under a discretionary power, but may sell where the power is mandatory in behalf of a trust.⁷⁴

The first question stated above naturally runs into the second; for, in the absence of a local statute, a power given to several, who are not executors, or who, while being executors, are not to exercise it as part of their duty and office, will not survive, but will fail as soon as any one of them dies,—the discretion being confided to all, and not to any smaller number. The tendency of the courts, being to keep powers alive, has therefore been towards connecting a power, especially that of sale, with the executorial office; that is, if the power is in aid of the winding up of the estate.⁷⁵ But where a widow, or other devisee for life, is given a power of sale for the evident purpose of enlarging her income, and for her own comfort, though she be appointed executrix in the will, she is deemed to be vested with the power personally, and will retain it exclusively, though she renounces the executorial trust.⁷⁶

Though one of several executors can dispose of personal goods and effects, and though, in equity, land which is ordered to be sold, and the proceeds invested as personality, is for many purposes treated as personality, yet all acting executors must join in the sale of such lands. In some cases other than that of a sale, the power confided to several seems to be so much of a personal trust that it cannot well be exercised by one acting executor, even if the others should refuse to qualify.⁷⁷

As to the implied selection of the executor to carry out a power of sale given in general terms, the courts of the American states are not fully agreed. The court of chancery in New York followed the doctrine announced by Sugden,—that, where the duty of keeping or applying the proceeds is laid upon the executor, his is also the duty,

⁷³ Leman v. Sherman, 117 Ill. 657, 6 N. E. 872.

⁷⁴ Edwards v. Maupin, 7 Mackey (D. C.) 39; Marshall v. Wheeler, Id. 414.

⁷⁵ The case of Brown v. Hobson, *supra*, note 68, has not been followed in recent times, least of all in Kentucky. See note 66.

⁷⁶ Larned v. Bridge, 17 Pick. 339.

⁷⁷ Perrin v. Lepper, 72 Mich. 454, 40 N. W. 859, where power was given to five executors to take an estate from the testator's son for bad conduct, and one only qualified and attempted to exercise it.

and hence the power, to sell,⁷⁸—while two early cases in South Carolina seem to require stronger indications, which are now dispensed with by statute as they are in many other states;⁷⁹ the result theretofore being that, for want of a designation of the donee, the power would fall to the ground.⁸⁰

In Pennsylvania, by statute, a power of sale found in a will, without any indication of the donee, may be exercised by the executor, with the approval of the probate court, while the donee, when designated, may sell without leave of court;⁸¹ while in many other states this power thus implied may be exerted, like an express power, without leave of court, unless leave is required also for an executor selling under an express power.⁸²

In the states in which administrators and executors can, with the license of the probate court, sell real estate for the payment of debts and legacies, it seems that they prefer to act under the local stat-

⁷⁸ *Davoue v. Fanning*, 2 Johns. Ch. 252; *Berger v. Duff*, 4 Johns. Ch. 368; *Cuthbert v. Babcock*, 2 Dem. Sur. (N. Y.) 96 (where a power given to executor by name was transferred to his successor); *Officer v. Board of Home Missions*, 47 Hun, 352 (where there was no indication of the executor at all, except that no one else was named); *Hale v. Hale*, 137 Mass. 168 (which relies on *Lippincott v. Lippincott*, 4 N. J. Eq. 121, and this in turn on 1 Sugd. Powers, 134, 139); *Putnam v. Story*, 132 Mass. 205 (where, on like grounds, the power was held to be in the administrator c. t. a., the sale being ordered after the death of the widow executrix). In *Mandlebaum v. McDonell*, 29 Mich. 78, the executor was thought to hold the power of sale, as an intent appeared not to give it to the beneficial devisees.

⁷⁹ *Drayton v. Drayton*, 2 Dessaus. Eq. 250, note; *Shoobred v. Drayton*, Id. 246. The New York doctrine seems to have prevailed generally throughout the country. In Maine the words "the real estate may be sold if deemed advisable" were held not sufficient to give the executor any power. *Whittemore v. Russell*, 80 Me. 297, 14 Atl. 497; *Queener v. Trew*, 6 Heisk. (Tenn.) 60. See *Indiana Rev. St. § 2359*. The executor has no implied power to sell after the life tenant's death. *Epley v. Epley*, 111 N. E. 505, 16 S. E. 321.

⁸⁰ E. g., in South Carolina before Rev. St. 1882, § 1971, was enacted.

⁸¹ Act Feb. 24, 1834. See *Gray v. Henderson*, 71 Pa. St. 368, where an acting executor was appointed.

⁸² Kentucky, Gen. St. c. 39, art. 1, § 9. New Jersey, act of April 14, 1891 (very broad and curative as to past powers and execution). For South Carolina see above; Oregon, § 1155 ("to be reported and confirmed like other executor's sales"). In North Carolina the administrator c. t. a. can act. *Smathers v. Moody*, 112 N. C. 791, 17 S. E. 532.

ute rather than under testamentary power; for which reason the Reports of Maine, Michigan, Wisconsin, and Minnesota are almost bare of cases arising under testamentary powers.⁸³

Generally speaking, where a discretionary power is given to the donee in trust for others, he must execute it himself, and cannot depute its execution to an attorney (though he may ratify the execution effected by the latter),⁸⁴ nor to a second donee named by him in a deed or will, unless the power has been expressly given to the donee "or his assigns," or in similar terms.⁸⁵ When the power is not discretionary, but wholly mandatory, and nothing but a choice of form is left to the donee, or where it is beneficial,—no person, or class of persons, other than the donee, being interested in its execution,—there is no reason why a devise or conveyance by the donee might not include a new power of sale or appointment. And the donee of a discretionary power, when he has once exercised it, may appoint an attorney to execute a deed under his direction to the person or persons already chosen, and for the consideration already agreed on.⁸⁶

The division of our country into states, which, for all purposes of private law, are independent of each other, and the lively intercourse between these states, often gives rise to another question: Can an executor who has qualified in one state exercise powers given him in a will over lands in another state, without obtaining (if, indeed, he can obtain) fresh letters testamentary from the courts of the latter? It is generally admitted that where the power is given without regard to executorship, where it is coupled with the estate and designation of "trustee," the donee may act under it in any state in which there is land subject to the power, provided he causes the

⁸³ As to ratification, see *Lake Shore & M. S. Ry. Co. v. Hutchins*, 37 Ohio St. 282.

⁸⁴ *Jennert v. Houser*, 4 Ohio Cir. Ct. R. 353 (power to allot shares not transferable); *Albert v. Albert*, 68 Md. 352, 12 Atl. 11 (but donee may empower his executor to make partition in prescribed shares); *Phillips v. Brown*, 16 R. I. 279, 15 Atl. 90 (life tenant with power to sell for her own support cannot transfer it by deed to a trustee).

⁸⁵ *1 Sugd. Powers*, 215; *Pardee v. Lindley*, 31 Ill. 174; *Strother v. Law*, 54 Ill. 413; *Collins v. Hopkins*, 7 Iowa, 463. "Assigns" includes devisees. *Druid Park Heights Co. v. Oettinger*, 53 Md. 46.

⁸⁶ See authorities in chapter on "Conveyances," section "Letter of Attorney." (912)

will to be proved and recorded in the proper office, in accordance with the laws of the state of the situs.⁸⁷

The executor and executrix of a will are so very often the persons nearest to the testator's heart that he will naturally confer upon them beneficial powers, and their fiduciary character does not prevent them from executing a power of management, sale, or mortgage for their own benefit.⁸⁸

§ 120. Time of Execution.

The power to sell, or to appoint otherwise, is often limited in time; for instance, an executor is to sell before or after some event, such as the death of the widow, or within a named number of years. It would have been simplest to enforce all such limitations as they are written, so that any attempt at executing the power before or after the limit would be deemed null. But while this is, of course, the rule,⁸⁹ there are broad exceptions. The courts look for the main

⁸⁷ *Veazie v. McGugin*, 40 Ohio St. 365; *Carmichael v. Elmendorf*, 4 Bibb (Ky.) 484, where the foreign will was simply probated in Kentucky, while under the present law of that state the executor would have to qualify within the state, which, unless a resident, he would not be allowed to do; in which case an administrator c. t. a. would have to make the conveyance. Where the estate was devised in Illinois to "the persons named as executors," with the discretionary power to sell Iowa land, the Iowa court held that they had power to sell, though they had not qualified in that state, and refused the application of an administrator c. t. a. for a judicial sale. *In re Van Brocklin's Estate*, 74 Iowa, 412, 38 N. W. 119. *Contra*, *Lees v. Wetmore*, 58 Iowa, 171, 12 N. W. 238 (under a New Hampshire will). The Iowa Revision, §§ 2328-2331, provide for sales under foreign wills. *Bromley v. Miller*, 2 Thomp. & C. (N. Y.) 575. A foreign executor can sell New York lands under a power, having recorded the will in New York.

⁸⁸ *Sweeney v. Warren*, 127 N. Y. 426, 28 N. E. 413.

⁸⁹ The following English and American decisions are collected in the reporter's notes to *Snell's Ex'rs v. Snell*, 38 N. J. Eq. 119, coming down to 1884, all against exercising a power of sale before the time limited: *Booraem v. Wells*, 19 N. J. Eq. 87; *Hampton v. Nicholson*, 23 N. J. Eq. 423; *Isham v. Delaware, L. & W. R. Co.*, 11 N. J. Eq. 227; *Fairly v. Kline*, 3 N. J. Law, 554; *Meyrick v. Coutts*, 1 Sugd. Powers, 335; *Smith v. Great Northern R. Co.*, 23 Wkly. Rep. 126; *Mosley v. Hide*, 17 Q. B. 91; *Want v. Stallibrass*, L. R. 8 Exch. 175; *Henry v. Simpson*, 19 Grant, Ch. 522; *Davis v. Howcott*, 1 Dev. & B. Eq. (N. C.) 460; *Jackson v. Ligon*, 3 Leigh (Va.) 161; *Raper v. Sanders*,

purpose of the donor, and when they conclude that the sale or other appointment by him was the main purpose, and that the time was inserted only as a matter of choice or preference, they have sustained the execution of the power, though it took place at the wrong time. Thus, where the donor bestows a life estate on his widow or daughter, and directs that the executor or trustee shall sell after her death, it has often been held that the postponement of the sale was directed for the benefit of the life tenant only, and that she can waive this delay by surrendering her life estate to those in remainder, and thus hasten the execution of the power.⁹⁰

A direction to executors to sell within a given time, so worded as to show the testator's desire to have a speedy settlement, was held not to forbid a sale after the limited time.⁹¹ Otherwise where a sale was ordered within one short period, and a further time was limited during which the trustee should manage the proceeds of sale, and then divide them, a sale after the expiration of the second period was deemed void.⁹² Where no time is prescribed the power

21 Grat. (Va.) 60; Hall v. McLaughlin, 2 Bradf. (Sur.) 107; Countess of Sutherland v. Northmore, 1 Dick. 56; Duke v. Palmer, 10 Rich. Eq. (S. C.) 380; Bazemore v. Davis, 48 Ga. 339,—the facts of which are there abstracted. See, also, later case of Brome v. Pembroke, 66 Md. 193, 7 Atl. 47 (indication in the will that a sale of the whole estate was not desired). But where successive life estates are given to A. and B., with power to the latter to appoint by will, she can do so during the life of A., and though she die before her. Lindsley v. First Christian Society, 37 N. J. Eq. 277.

⁹⁰ Snell's Ex'r's v. Snell, 38 N. J. Eq. 119, relying on Uvedale v. Uvedale, 3 Atk. 117, Gast v. Porter, 13 Pa. St. 533, and Styer v. Freas, 15 Pa. St. 339; followed in Hamlin v. Thomas, 126 Pa. St. 20, 17 Atl. 506. Contra, Kilpatrick v. Barron, 54 Hun, 322, 7 N. Y. Supp. 542. In Hamlin v. Thomas the life tenant's consent was given by parol, which, not falling under the Pennsylvania statute of frauds, was deemed sufficient.

⁹¹ Shalter's Appeal, 43 Pa. St. 83, followed in Hale v. Hale, 137 Mass. 168, relying on 1 Sugd. Powers, 134, 139; Mott v. Ackerman, 92 N. Y. 539; Waldron v. Schlang, 47 Hun, 252, where the delay was very much beyond the time, but the sale was imperatively ordered. And see Cussack v. Tweedy, 126 N. Y. 81, 26 N. E. 1033, where a sale was sustained, though made after its purpose seemed to have been accomplished. A sale for division among remainder-men need not be made at the first moment when the remainder falls in. Hallum v. Silliman, 78 Tex. 347, 14 S. W. 797.

⁹² Bakewell v. Ogden, 2 Bush (Ky.) 265 (whether a sale after the expiry of only the first period would have been good was left undecided). The court
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may be executed, as long as its purpose has not become plainly impossible or needless, unless the delay be so unreasonable as to indicate that the attempted execution is an afterthought, and is directed to some fraudulent end.⁹³ But, where a power has been given to sell for the testator's debts, it does not expire necessarily because they have ceased to be a lien on the testator's lands, or even because the statute of limitations has passed over the debts.⁹⁴

Where a power of management, and ultimately of sale, is given to executors, which in its nature must be drawn out over a longer time than that within which the personal estate is settled, the executors will retain their testamentary powers over the land, though they may have settled their accounts and have been discharged as personal representatives, being still considered as trustees, though not named as such in the will. The purpose of the testator in giving such powers is to save to his devisees the cost and trouble of an administration suit; and the courts, in order to carry out this as the main purpose, will not allow the power to cease by lapse of time, if they can help it on any plausible ground.⁹⁵ On the other hand, when the proceeds of sale are to be paid to some object of the donor's bounty for her more comfortable support, the intent is that the sale should take place during her life. After her death the assigned purpose of the power ceases, and with it the power itself. In such cases even such words as "at any time," will be disregarded, and a sale made after the death of the beneficiary will be held unauthorized, and the purchaser is bound to take notice of the event by which the power comes to an end.⁹⁶

relied on 4 Kent, Comm. 365, 366, and cases there quoted in note b; also, Lancashire v. Lancashire, 2 Phil. Ch. 657; Richardson v. Sharpe, 29 Barb. (N. Y.) 225.

⁹³ Moores v. Moores, 41 N. J. Law, 440. Whenever the life tenant herself is mainly interested in the execution of the power, it will not expire. Cotton v. Burkelman, 142 N. Y. 160, 36 N. E. 890.

⁹⁴ Morse v. Hackensack Sav. Bank, 47 N. J. Eq. 279, 287, 20 Atl. 961; McDonald v. Hamblen, 78 Tex. 628, 14 S. W. 1042 (where the deed recited a debt which seemed to be barred by time, but the action of the purchaser was against a stranger to the title, not against the heir or devisee).

⁹⁵ Sheets' Estate, 52 Pa. St. 257, 266 (to manage, sell, and reinvest); Perkins v. Moore, 16 Ala. 14; Scholl v. Olmstead, 84 Ga. 693, 11 S. E. 541.

⁹⁶ Wilkinson v. Buist, 124 Pa. St. 253, 16 Atl. 856; Fidler v. Lash, 125 Pa. St. 87, 17 Atl. 240; Harvey v. Brisbin, 50 Hun, 376, 3 N. Y. Supp. 676 (where

The winding up of an estate—that is, turning the goods and effects into money, and paying burial expenses, debts, and legacies—must, under the local law, be brought to an end in a short time, generally not much, if at all, longer than a year; and, where the will does not confer on the executor any power over the land, he would, after thus fully disposing of the personalty and rendering his account, no longer be considered executor. Yet the time for selling the land might not have come. Hence, it has been held, in order that a power of sale given to an executor might not be defeated, that it does not expire with the full performance of his ordinary duties, and his account and exoneration in the county court.⁹⁷

§ 121. Manner of Execution.

Where a power is coupled with an interest or an estate, the deed or will or other writing for executing it is not, like a deed of conveyance made by an attorney, drawn in the name of the donor of the power. Executors or trustees usually append their fiduciary character to their names when signing a deed in pursuance of their powers, besides setting forth such character in the body of the instrument, but it is clear that, in the case of a trustee, or of an executor to whom the estate is devised and who thus becomes a trustee, this description of character is not necessary; and where the executor has a simple power to convey, the descent to the heirs not being broken, it is only necessary that he should, either in the body or with his subscription, indicate his relation to the property.⁹⁸ Under

the proceeds were to go to two daughters; one died; sale of her moiety held void); *Harmon v. Smith*, 38 Fed. 482.

⁹⁷ *Munson v. Cole*, 98 Ind. 502, where the sale was to take place in not less than five years from the testator's death, *Hoffman v. Hoffman*, 66 Md. 568, 8 Atl. 466. Great inconvenience may arise in such cases from the exoneration of the executor's bondsmen.

⁹⁸ 1 Sugd. Powers, 413-423; for the deed must operate under the power as far as it does not on the interest. This would not apply to statutory powers, e. g. where administrators or executors are authorized by statute to sell lands for payment of debts. *Thorp v. McCullum*, 1 Gilman (Ill.) 615. Deed should on its face convey the decedent's estate. *Coffing v. Taylor*, 16 Ill. 457. So, also, *Moore v. Humpton*, 1 Whart. (Pa.) 433; *Terry v. Rodahan*, 79 Ga. 278. 5 S. E. 38 (donee's deed serves to execute the power, though in his own name,

the old doctrine, built on the statute of uses, the appointment is only the written declaration of the use by which the land is to be held under the donor's deed or will. The title, or "possession," attaches itself to this use at once, if only the original instrument is such as will raise such a use; but no forms are required in the instrument of execution, which only names the cestui que use, except those forms which the words of the power call for. Hence, a writing by which an appointment was made inter vivos need not have been either sealed or delivered; or, if a writing "under hand and seal" was called for, it still need not have been delivered.⁹⁹ But, if the appointment was to be "by deed," this implied both sealing and delivery, and probably, also, those other incidents, as attestation or acknowledgment, which by the local law might belong to a deed of conveyance.¹⁰⁰

In like manner, power may be given to appoint by a writing in the nature of a last will, which means an instrument that does not become final until the death of the donee or appointor, but may be revoked or supplanted at any time. Generally, such a writing must be executed with the solemnities required by the statute on wills as to the manner of subscription and number of witnesses; these solemnities being implied by the words "last will," and plainly so when the power is simply "to devise" or "to appoint by will." But the donor may dispense with some of the forms of the statute, or may require other forms, and if such other requirements are made, the donee must obey them literally.¹⁰¹ While the donor might con-

when he has no estate at all of his own to grant). That an administrator c. t. a. styles himself "executor" is quite immaterial. See, also, *McCreary v. Bomberger*, 151 Pa. St. 323, 24 Atl. 1066.

⁹⁹ "When the mode in which a power is to be executed is not defined, it may be executed by deed or will, or simply by writing." 4 Kent, Comm. 330; *Christy v. Pulliam*, 17 Ill. 59. As to needlessness of delivery, see 1 Sugd. Powers, 298; *Cueman v. Broadnax*, 37 N. J. Law, 508; 1 Sugd. Powers, 278. Thus, under a testamentary power to divide lands, it is enough if the holder of the power defines the boundaries in writing. *Elle v. Young*, 24 N. J. Law, 786.

¹⁰⁰ 1 Sugd. Powers, 280. And a deed made under a power, though it might have been executed by will, cannot be revoked. *Id. p. 274.*

¹⁰¹ 2 Sugd. Powers, 11; but see in *Hacker's Appeal*, 121 Pa. St. 192, 15 Atl. 500, how astute the court was to find a seal, in order to comply with a power to devise by will under seal. See, on this subject, Mr. Sumner's note in his

fer on another person the power to dispose of his property, by a writing in the nature of a will, without the attestation of the usual three witnesses, he could not secure such a power to himself by way of reservation in a deed of settlement.¹⁰²

A system by which the owner of land can impose upon it for a long period of time his own "domestic laws," as Chancellor Kent called them, according to which the land may be aliened or devised, led naturally to much confusion, and often to a failure of justice and of the purpose entertained by donor and donee. Powers would demand a will "under hand and seal," while the statute was silent about a seal; or would call for an "attestation" by the witnesses, which the courts construed to refer to the signing, while the usual way of attesting was "sealed and delivered in presence." Parliament sought to cure a small part of the mischief already done by "Preston's Act" in 1814, but did not place the whole matter on a sensible basis until 1837, after the revisers of the New York statutes had set the example.¹⁰³

edition of Vesey, Jr.'s, Reports (volume 1, p. 49), to *Fettiplace v. Gorges*: "It is to be observed that where the power has been given to married women to appoint the use of land by will, without more, the will must be intended such a one as is proper for the disposition of land, and consequently must be subscribed by three witnesses, etc. For whether such an instrument be, strictly speaking, a will, or only in the nature of a will, it is within all the inconveniences which the statute of frauds intended to prevent. However, under a special reservation to that effect, a donee of a power affecting real estate may, it seems, well execute the same by a will not attested according to the statute, etc. For though no man can reserve to himself a power of disposing of his own real estate by will not executed according to the statute (*Goodill v. Brigham*, 1 Bos. & P. 198; *Habergham v. Vincent*, 2 Ves. Jr. 226), yet a power given to another to charge the real estate of the donor of the power by the will of the donee may admit execution by a will attested by two witnesses only; the charge in such case being in fact imposed by the instrument creating the power, not by the will, etc. (*Jones v. Clough*, 2 Ves. Sr. 365). It has been * * * matter of controversy whether a disposition of property duly made by a feme covert, and to take place after her death, be or be not, in technical strictness, a will, or whether it ought only to be termed an instrument in writing. *Duke of Marlborough v. Lord Godolphin*, Id. 75."

¹⁰² 1 Sugd. Powers, 118, 155.

¹⁰³ The act 54 Geo. III. c. 168, is copied at large in 1 Sugd. Powers, p. 264, etc. Kent quotes the following cases as to the strict insistence of the English courts on the forms demanded by the donor: *Hawkins v. Kemp*, 3 East, 410;

The distinction between a will and an instrument in the nature of a will is not of much practical value, unless some of the forms of a will are dispensed with. It is true that the disposition made by a married woman could not be a true will, and, indeed, an appointment of an estate by a person to whom it did not belong in fee, could never, strictly speaking, be called a last will; yet these dispositions, that were ambulatory until the donee's death, were, even before the late statutes, treated as wills. Thus, the English courts would not act on the donee's will of personality, though she were a married woman, unless it had been first admitted to probate by the spiritual court, and after it was thus shown to have been a good last will, the temporal court would try the further question whether it was a good appointment.¹⁰⁴ And this course is pursued in the American courts as to real estate also. The donee's last will, being first probated (which implies that it is executed so as to devise lands in the state of the situs), is then tested as an appointment, and may be rejected as such, either for the want of additional forms, called for by the donor of the power, or because on other grounds it does not well execute the power.¹⁰⁵

The revisers in New York, whose work went into effect on the 1st of January, 1830, and the legislatures of Michigan, Wisconsin, Minnesota, and the Dakotas, who followed their draft, laid down prospectively two simple rules: First, all the forms which the law demands, either in a conveyance or in a last will by which a man disposes of his own land, must be complied with by the donee of a

Doe v. Peach, 2 Maule & S. 576; Wright v. Barlow, 3 Maule & S. 512; Wright v. Wakeford, 17 Ves. 454, 4 Taunt. 213. He also refers to Doe v. Smith, 1 Brod. & B. 97; on error, 2 Brod. & B. 473,—on question whether a lease with a limited right of re-entry for nonpayment of rent was a good execution of power to make leases with clause of re-entry.

¹⁰⁴ 2 Sugd. Powers, 18, quoting Hume v. Rundell, 6 Madd. 331; Ross v. Ewer, 3 Atk. 156; admitting that at one time it was held otherwise.

¹⁰⁵ Ocheltree v. McClung, 7 W. Va. 232; Thrasher v. Ballard, 33 W. Va. 285, 10 S. E. 411. See cases there quoted. In Kentucky, the probate court, when passing, before the Revision of 1893, on the will of a married woman made under color of an express power, or of that implied in the ownership of "separate estate," would first try the question whether the woman had property subject on such grounds to testamentary disposal. Hickman v. Brown, 88 Ky. 377, 11 S. W. 199. As to the *lex rei sitae*, see Blount v. Walker, 28 S. C. 545, 6 S. E. 558.

power, though the donor may have dispensed with some of these forms. Second, the requirement of any additional formalities, such as a seal to a will, or three witnesses instead of two, or attestation to a deed, in a state not requiring conveyances to be witnessed, is to be held for naught or as not written.¹⁰⁶ Other states, also, have, in whole or in part, adopted one or both of these rules,—as Kentucky, West Virginia, etc.¹⁰⁷ Under the New York rules there are, as to the manner of execution, only two kinds of power,—one, by deed; the other, by will. The statute of conveyances and the statute of wills do all the rest.

Most of these statutes also provide that deeds under powers must be recorded like other deeds in order to obtain precedence over the claims of creditors or subsequent purchasers;¹⁰⁸ but herein they only affirm the former doctrine, laid down by Sugden as to the "register counties" of England.¹⁰⁹ And such seems to be, also, the rule in those American states which have not legislated on the subject. In the absence of statutes, or in cases which they do not reach, the American courts have, on the whole, followed the older English precedents. As the requirements of the donor, in the words of Chancellor Kent, are wholly arbitrary, the courts cannot put any equivalent in their place. Thus, a donee being empowered to dispose of land by a writing attested by two or more witnesses,

¹⁰⁶ In the Minnesota Statutes, c. 44 ("Powers") §§ 40-45 provide: "No power is to be executed but by an instrument which is sufficient to convey the maker's own estate, and which is a conveyance, unless it be a will; when the power is confined to a devise it must be a will conforming to the statute of wills; where the power dispenses with formalities it is not for that reason void, but the formalities must be complied with; and when it demands other formalities these may be omitted." The same provisions are found in the laws on powers of the other named states, in the corresponding places.

¹⁰⁷ West Virginia, Code, 1891, c. 77, § 4 (no will under a power is effective unless executed so as to pass the lands of the testator). In Kentucky, under chapter 113, § 6, Gen. St., none of the forms of a will can be dispensed with in any case; but other formalities may be required in the will of a married woman.

¹⁰⁸ In Minnesota, c. 44, § 41, directs that every instrument in execution of a power, other than a will, is a conveyance, and subject to all the provisions of chapter 40 ("Conveyances"); hence follows the necessity and effect of recording.

¹⁰⁹ 2 Sugd. Powers, 19, quoting Srafton v. Quincy, 2 Ves. Sr. 413.

his deed sealed, acknowledged, and delivered in the usual way, but not thus attested, was deemed wholly inoperative at law.¹¹⁰ Or, when a will is demanded, "under hand and seal," an unsealed will is insufficient, though a court would go far to find a seal,—e. g. where a will and codicil are published at the same time, the seal to the latter might save the former (though on separate sheets), or a mere dot might be magnified into a scrawl. But the omission of a third witness, when demanded by the power, cannot be condoned.¹¹¹ Neither at common law nor under the New York statute can a power to appoint by deed be executed by will, or a power to devise be executed by a conveyance.¹¹²

Where a donee has a power of disposition by either deed or will, his will may, like that of an owner, be annulled by his subsequent alienation by deed, even where the donee is a married woman, whose deed or will is of no force except under the power. The older doctrine, by which even an abortive deed of conveyance was deemed, as far as it went, a revocation of a will, as it showed an intent to revoke, is no longer in force in any American state (unless perhaps in North Carolina and Tennessee), as the statute everywhere else regulates the revocation as well as the publication of wills. Hence, while formerly the unauthorized deed of one having full capacity was held to revoke a will made under a power (the unauthorized deed of a married woman never did), it may be stated as the modern doctrine that a donee's will cannot be revoked by his deed, unless that deed takes effect.¹¹³ Where a power of sale or of appointment of any kind is to be executed only with the consent of certain

¹¹⁰ Ladd v. Ladd, 8 How. 10; Justis v. English, 30 Grat. (Va.) 565; Montgomery v. Agricultural Bank, 10 Smedes & M. (Miss.) 566; Breit v. Yeaton, 101 Ill. 242; Thrasher v. Ballard (W. Va.) 10 S. E. 411, arguendo.

¹¹¹ Pepper's Will, 1 Pars. Eq. Cas. (Pa.) 436; Porter v. Turner, 3 Serg. & R. (Pa.) 110; Ocheltree v. McClung, 7 W. Va. 232. This state, though it does not allow any of the forms of the statute of wills to be dispensed with, does not forbid the imposition of additional forms by the donor.

¹¹² Minnesota, c. 44, §§ 41–43; incidentally decided in many cases quoted in sections 116 and 124 of this chapter. A will cannot, by a covenant against revocation, take the place of a deed. Reid v. Boushall, 107 N. C. 345, 12 S. E. 324. See, also, Moore v. Dimond, 5 R. I. 121.

¹¹³ As to the old law, see Walton v. Walton, 7 Johns. Ch. 258, 269 (in general); 2 Sugd. Powers, 13 (wills under powers); as to will of feme covert, Newburyport Bank v. Stone, 13 Pick. 420.

parties other than the donee of the power, the same rules apply to the expression of the consent as to the appointment itself; and unless the forms of consent prescribed by the donor are complied with, the consent itself and the appointment which depends upon it are void at law.¹¹⁴ The states, led by New York, which regulate this branch of the law by statute, have looked to this matter also. The consent of third parties may be given by joining in the instrument of appointment, or shall be certified in writing, and the signature shall be certified for record, as if set to a conveyance of land, and it seems that any other formalities which the donor of the power might have demanded would be dispensed with.¹¹⁵

§ 122. Intent to Execute.

Where the will or deed of the "donor" gives to the "donee" a power over an estate, to be executed by will or by an instrument in the nature of a last will, and a will is made by the donee, the question often arises whether the devises thereof are to be understood as an execution of the power or are to be referred only to the donee's own estate. Of course, the same question will sometimes arise where the donor and donee are found in the same person, the power being reserved by the grantor to himself in a deed. In passing on this question the states have fallen into three distinct groups: Those which follow the old English rule, which is least favorable to the appointees under the power; those which have, to rid themselves of the injustice of this rule, enacted laws most favorable to the execution of the power; and those which approach the question whether the will of the donee is meant to carry out the power placed in his hands as one of testamentary construction, free from all technical rules, and looking only to the testator's intent as shown by the testator's will and such surrounding circumstances as may be shown in the interpretation of the will.

The English rule was laid down in 41 & 42 Eliz., in Sir Edward

¹¹⁴ Johnson v. Yates, 9 Dana (Ky.) 497; 4 Kent, Comm. 334. Coryell v. Dunton, 7 Pa. St. 530, where a mortgage operated as a revocation, under a right to revoke, reserved in a deed of trust.

¹¹⁵ See Minnesota, c. 44, § 48; Schenck v. Ellingwood, 3 Edw. L. (N. Y.) 175.

Clere's Case, reported in 6 Coke, 17b. The burden of showing that the donee in his will intended to execute a power rests on those who claim as appointees, and they can show it only in one of three ways: Either that the devise refers to the power, which of course removes all doubt; or that it disposes of the subject of the power, which is not always so clear; or that the will would be inoperative unless it were an execution of the power, the donee having nothing of his own to fit the words of the devise. This rule was adhered to by the English courts down to 1830, and would have been quite reasonable if the courts had been more easily satisfied of the identity between the subject of the power and the thing devised in the donee's will.¹¹⁶ But so many executions of powers, clearly intended, were defeated by the refusal of the court to see such identity that parliament had to interfere at last by shifting the burden of proof in all cases in which the donee purports in his will to dispose of all his property.¹¹⁷

The legislature of New York took the same step somewhat earlier, in the Revised Statutes, which provide: "Lands embraced in a power to devise shall pass by a will purporting to convey all the real property of the testator, unless the intent that the will shall not operate as an execution of the power shall appear expressly, or by necessary implication"; and the courts have acted on it in several late cases.¹¹⁸ The New York rule is found, also, in the laws of those

¹¹⁶ The cases are collected in *Doe v. Roake*, 2 Bing. 497, before the common pleas, whose judgment was reversed by that of the king's bench, and the latter affirmed in the house of lords. See 6 Bing. 475, mainly on the authority of the very hard case of *Jones v. Tucker*, 2 Mer. 533. Aside of Collier's Case, 6 Coke, 17, are quoted, among others, *Bennett v. Aburrow*, 8 Ves. 609; *Standen v. Standen*, 2 Ves. Jr. 589. On the other side, *Scrope's Case*, 10 Coke, 144 (where a deed is referred to a power of revocation, not being valid otherwise), and the Case of *Commendam*, Hob. 140. See the comments of Sugden on Powers (volume 1, p. 401, § 76). A fuller list of authorities will be found in the arguments in *Blagge v. Miles*, 1 Story, 426, Fed. Cas. No. 1,479.

¹¹⁷ St. 7 Wm. IV.; and 1 Vict. c. 26, § 27.

¹¹⁸ Rev. St. (8th Ed.) p. 2450, § 126, enforced in *Hutton v. Bankard*, 92 N. Y. 295, which is followed by the supreme court in *Kibler v. Miller*, 57 Hun, 14, 10 N. Y. Supp. 375. The law of New York was, in Kent's opinion, nearly the same before 1830. See *Jackson v. Delancy*, 13 Johns. 537.

states which have copied the New York legislation on powers,—that is, in Michigan, Wisconsin, Minnesota, and the Dakotas.¹¹⁹ It has also been adopted in Kentucky, Alabama, North Carolina, Virginia, West Virginia, California, and Montana, in 1879 in Pennsylvania, and in 1888 in Maryland (in the two last-named states after the inconvenience of the old rule had been manifested by cases coming to the highest courts of those states for decision);¹²⁰ while in Massachusetts, the supreme court, cutting loose from the English precedents, adopted the principle of the act of parliament as being the more reasonable.¹²¹

Under the old English rule, it might be properly held that, where a married woman, not capable to make her last will generally, undertakes to devise her estate, she must refer to a power of appointment by will,—a “separate estate” being in its origin nothing more than an estate over which a married woman has such a power,—and no further reference to the power should be required, and it has been so held.¹²²

The third mode by which the intent to execute the power might

¹¹⁹ Michigan, Ann. St. §§ 5640, 5642; Wisconsin, St. §§ 2149, 2151; Minnesota, c. 41, §§ 50, 52; Dakota, Civ. Code, §§ 732, 733.

¹²⁰ Kentucky, Gen. St. c. 113, § 22, taken from chapter of “Wills,” (Rev. St. 1852, § 21); Virginia, § 2526; West Virginia, c. 77, § 15; North Carolina, § 2143 (referred to in *Blake v. Hawkins*, 98 U. S. 315, where it is said that the declared intent to execute the power is not enough, where the will does not contain apt words, to dispose of the subject); Pennsylvania, Dig. c. “Wills,” § 25, being No. 101, § 3, Acts 1879; California, Civ. Code, § 1330; Montana, Prob. Code, § 487; Utah, c. 44, §§ 1, 2, 14; Alabama, Civ. Code, § 1948. The acts of Pennsylvania speak of a devise of all of the testator’s land, or all his lands at some place or in some one’s occupation. In Pennsylvania the new rule applies to the wills of all donees dying after June 4, 1879.

¹²¹ *Amory v. Meredith*, 7 Allen, 397; followed in *Willard v. Ware*, 10 Allen, 263; *Bangs v. Smith*, 98 Mass. 270. These decisions approve the rule of the English statute, that is, the presumption in favor of the appointment. The last and strongest case, *Cumston v. Bartlett*, 149 Mass. 243, 21 N. E. 373. *Blagge v. Miles*, 1 Story, 426, Fed. Cas. No. 1,479, decided by the United States circuit court sitting in Massachusetts, treats the whole matter as one of intention.

¹²² *Churchill v. Dibben* (27 Geo. II.), quoted in note to 9 Sim. 447; and see *Curteis v. Kenrick*, there reported.

be shown under the old rule has been reduced, by those courts which carry the rule out strictly, to this: that where the donee of the power devises land, and has none of his or her own, the devise will be referred to the power.¹²³ With more or less rigor, the old rule, thus understood, has been recognized in the Maryland cases arising before the late statute;¹²⁴ in Rhode Island, rather strictly;¹²⁵ in Pennsylvania, before the act of 1879;¹²⁶ in South Carolina,¹²⁷ and in Connecticut. And the same doctrine has been approved in Indiana, though not in a case where a will by the donee was before the court.¹²⁸

¹²³ *Blagge v. Miles*, 1 Story, 426, 454, Fed. Cas. No. 1,479, *arguendo*; *Standen v. Standen*, 2 Ves. Jr. 589.

¹²⁴ *Mory v. Michael*, 18 Md. 241, and many other cases down to *Balls v. Dampman*, 69 Md. 390, 16 Atl. 16, and *Cooper v. Haines*, 70 Md. 282, 17 Atl. 79, as quoted in *Mines v. Gambrill*, 71 Md. 30, 18 Atl. 43, where the appointee, being the donee's husband, would have gotten her personality in the absence of a will. This was not deemed enough to prove the execution of the power in the third way. In *Balls v. Dampman*, *supra*, the appointment by will was held bad, being for the payment of donee's debts, against the true meaning of the donor's will.

¹²⁵ *Cotting v. De Sartiges*, 17 R. I. 668, 24 Atl. 530, turning on the will of Allen Thorndike Rice, the donee. This case quotes *Phillips v. Brown*, 16 R. I. 279, 15 Atl. 90, which relies mainly on the rule laid down in Kent's Commentaries. Also *Grundy v. Hadfield*, 16 R. I. 579, 18 Atl. 186; and *Matteson v. Goddard*, 17 R. I. 299, 21 Atl. 914, where a residuary devise is held not to execute a subsequently reserved power of revocation. The court deems the English rule too firmly settled to yield to anything short of legislation.

¹²⁶ *Bingham's Appeal*, 64 Pa. St. 345. The court professes that the donee's intention is the criterion; but this intention must appear in the instrument, and must not rest on an equivocal or uncertain state of facts. That the bequests exceed the donee's estate is not enough. The court insists that the donor's will is to be interpreted; hence the English statute cannot govern, though the donee resided in England, the donor having lived and made his will in Pennsylvania. Older Pennsylvania cases are quoted in favor of the old rule. *Wetherill v. Wetherill*, 18 Pa. St. 265; *Thompson v. Garwood*, 3 Whart. 287; *Heffernan v. Addams*, 7 Watts, 116, etc. Will sustained on third ground. Pepper's Will, 1 Pars. Eq. Cas. 436, 444. *Dillon v. Faloon*, 158 Pa. St. 468, 27 Atl. 1082 (general devise without recital of power is good; decided under the act of 1879).

¹²⁷ *Bilderback v. Boyce*, 14 S. C. 528. Here, as in one of the Maryland cases, the appointment was in favor of creditors, and probably not within the power; but the court fully sustained the old rule as to execution.

¹²⁸ *Hollister v. Shaw*, 46 Conn. 248 (quoting *Johnson v. Stanton*, 30 Conn.

In Illinois and in New Jersey the whole matter has been put upon the foot of interpreting the donee's will, and following out the intent without indulging presumptions on either side, just as devises are otherwise interpreted in the light of the whole will and of the circumstances which surround it. The supreme court of Illinois has taken this ground in a late case, after an exhaustive review of the English authorities, and its conclusions have been approved by the supreme court of the United States. The court would not tie itself down to the three lines of proof named in Sir Edward Clere's Case, though even these, if liberally followed out, would generally be sufficient to reach the true intent. Thus, where the testatrix has an undivided share in a parcel of land in fee, and the power of appointment over the other share, an intent to devise the former and withhold the latter should not be assumed, nor when the will includes articles, though of personality, which are clearly within the power.¹²⁹

Neither a deed nor will can, however, be taken as the execution of a power, which is contained in an instrument that was executed after such deed or will was drawn up.¹³⁰ If a will is once made that operates as a lawful execution, its effect is not destroyed by a subsequent codicil which contains an unauthorized appointment. The latter should be rejected, and the former will stand, as we cannot impute to the donee an intent to defeat the execution from an attempt to exceed its proper limits.¹³¹

Where the execution of a power is not by will, but by conveyance, questions of intent can seldom arise, as a deed or other writing for

297). Two of the five judges dissented. *Dunning v. Vandusen*, 47 Ind. 423, where *Denn v. Roake*, 5 Barn. & C. 720, is approved.

¹²⁹ *Funk v. Eggleston*, 92 Ill. 515 (which has been quoted by other courts as well considered, and where the leading English and American cases can be found); *Meeker v. Breintnall*, 38 N. J. Eq. 345 (where the chancellor found an intention not to execute); *Munson v. Berdan*, 35 N. J. Eq. 376 (where the bequest of a sum equal to that named in the power was held sufficient to show the intent); *Warner v. Connecticut Mut. Ins. Co.*, 109 U. S. 361, 3 Sup. Ct. 221. But see *Payne v. Johnson*, 95 Ky. 175, 24 S. W. 238, 609, where a deed of his "property" by the owner of half in fee, half for life with power, was restricted to the former.

¹³⁰ *Vaux's Estate*, 11 Phila. 57; *Fry's Estate*, Id. 305; *Howard v. Carusi*, 4 MacArthur (D. C.) 260.

¹³¹ *Austin v. Oakes*, 117 N. Y. 577, 23 N. E. 193.

transferring land nearly always identifies the tract, and the quantity of the estate, both in duration and in share or entirety, which it is intended to convey. The provision in the New York and kindred statutes, to the effect that every instrument made by the holder of the power, conveying or charging an estate which he has otherwise no right to convey or to charge, shall be deemed an execution of the power,¹³² seems to be but declaratory of the common law,¹³³ though "if there is an interest and a power existing together in the same person over the same subject, and an act be done without a particular reference to the power, it will (at common law) be applied to the interest and not to the power."¹³⁴

There are a number of cases that cannot well be classified, in which the court passes on the donee's deed, gathering from its whole context and from the surrounding circumstances its conclusion whether there was or was not an intent to execute the power, or only to convey the donee's own interest.¹³⁵ As it is, however, most regular that the deed of the donee should refer to the will or other instrument containing the power, and should purport to act under it, a purchaser may insist, for his own security, that the donee should thus clearly indicate his intention.¹³⁶

¹³² New York, Rev. St. (8th Ed.) p. 2450, § 124; other states, in sections quoted above, note 119; not adopted in most of the other states which deal with devises under powers.

¹³³ The cases on deeds go back to Scrope's Case, 10 Coke, 145. See Coryell v. Dunton, 7 Pa. St. 530. See, also, Roe v. Tranmarr, Willes, 682, in 2 Smith, Lead. Cas. 461, and Hare's notes to same. The power need not be referred to; Axtel v. Chase, 77 Ind. 74; South v. South, 91 Ind. 221; Downie v. Buennagel, 94 Ind. 228; Hamilton v. Crosby, 32 Conn. 342; Jones v. Wood, 16 Pa. St. 25; Wetherill v. Wetherill, 18 Pa. St. 265, 270.

¹³⁴ 4 Kent, Comm. 334. Where a widow has a power to divide between herself and children, a conveyance of part of the land is taken as setting it aside for herself. May v. Town Site Co., 83 Tex. 802, 18 S. W. 959.

¹³⁵ Yates v. Clark, 56 Miss. 212; Benesch v. Clark, 49 Md. 497; Coffing v. Taylor, 16 Ill. 457 (intent not to execute); Den v. Crawford, 8 N. J. Law, 90 (the intent should appear in some way); Hanna v. Ladewig, 73 Tex. 37, 11 S. W. 133 (intent somewhat doubtful, but found to have been expressed).

¹³⁶ Johnson v. Johnson, 108 N. C. 619, 629, 13 S. E. 183.

§ 123. Substance of Execution.

A power may be executed by the proper person with all the formalities prescribed by the law of the state or the will of the donor, the intention to execute may be clear enough, and the instrument of appointment may seem to fill the requirements of the power, and yet the question may arise, is this a substantial compliance?—a question which is not easily separated from that of the true construction of the power.

A power of sale may of course be executed in parts, whenever land is susceptible of division, and a sale of the whole at one time is not expressly demanded. And where the donee has the choice to encumber, to lease, or to sell, the incumbrance or lease may be considered as a partial execution; and, if the purpose of the power is not fully accomplished, he may afterwards sell the remaining interest, just as he could first have mortgaged or demised, and thereafter sold, his own land.¹³⁷ And so a power of distribution need not be fully executed at one time. Conveyances may be made of separate parts of the land to the several beneficiaries at different times. Indeed, the holder of a power might distribute the estate by appointing a part thereof to one or more persons within the named class, and allowing the residue to go to the whole class for want of appointment; in which case the result aimed at by the donor, that each member thereof should receive some share, would be reached.¹³⁸ And, where the distribution is void in part, a share of the land or part of the estate in duration being given to persons outside of the named class, opinions are divided whether only the shares or estates thus improperly appointed will go to the uses limited upon default of appointment, or whether the whole appointment shall go for naught, as a partial annulment might work out a distribution alike unforeseen by the donor and the donee.¹³⁹

¹³⁷ Asay v. Hoover, 5 Pa. St. 21. The general rule is that a power is exhausted by a single use. Ex parte Elliott, 5 Whart. (Pa.) 524. And so with a beneficiary who has power to assent to a mortgage or sale. Duryee v. Martin, 36 N. J. Eq. 444.

¹³⁸ 2 Sugd. Powers, 581; Russell v. Kennedy, 66 Pa. St. 248.

¹³⁹ Horwitz v. Norris, 49 Pa. St. 213. In this case an equal division was made among children, but the daughters' shares were given for life only.

And this brings us to the vexed question of "illusory appointments." Where the donee is authorized to divide an estate among those of a given class,—for instance, the testator's children,—he must, at common law, give some part of it to each, no matter how small that share may be. Should he appoint the whole estate without giving some part to one of the prescribed beneficiaries, the whole appointment would fall to the ground, as the court could not use its own discretion in satisfying the pretermitted beneficiary. But at an early date the English equity courts insisted that the share given to each member of the class must be something substantial, not a mere trifle to save appearances. When the appointment was illusory, the fund would be divided equally among the whole class.¹⁴⁰ This doctrine led to great uncertainty, as no rule could be laid down as to what fraction of an equal share would be unsubstantial, and in 1830 the rule of relieving against so-called illusory appointments was abolished by act of parliament.¹⁴¹

The doctrine was brought to this country, and is recognized by Kent and Story. However, there is no reported American case in which a court has set aside an unequal distribution, unless it was brought about by fraudulent combination between the appointor and the appointee; none on the simple ground that some of the shares were not substantial. On the contrary, this equitable doctrine of illusory appointments has been expressly repudiated in Pennsylvania and in South Carolina, has been doubted in Virginia, and would probably be also rejected in other states, should occasion arise, though it has been recognized in Maryland.¹⁴² New

with remainder to their children. The court treated these remainders as a single fund, and by dividing it among the daughters, in default of appointment, gave a fee to each. *Contra, Myers v. Safe-Deposit & Trust Co.*, 75 Md. 413, 21 Atl. 58.

¹⁴⁰ 1 Sugd. Powers, 583-589; *Vanderzee v. Aclom*, 4 Ves. 784; *Butcher v. Butcher*, 1 Ves. & B. 79; *Kemp v. Kemp*, 5 Ves. 849; *Astry v. Astry*, Finch, Prec. 256; *Thomas v. Thomas*, 2 Vern. 513. For the rule at law see *Hudsons v. Hudson's Adm'r*, 6 Munf. (Va.) 352, and the older case of *Morris v. Owen*, 2 Call (Va.) 520.

¹⁴¹ 1 Wm. IV. c. 46, drawn by Sugden. The enactment of this statute attesting the inconvenience of the old rule has had some weight with American courts in breaking down the rule.

¹⁴² Story, Eq. Jur. §§ 252-255; *Graeff v. De Turk*, 44 Pa. St. 527, 534

York, Michigan, etc., have, however, gone further. Under their statutes, where the grantee of the power is authorized to distribute in such manner or proportions as he may think proper, he may allot the whole to any one or more of the designated persons; while, if no such discretion is expressly given, he must divide equally.¹⁴³

The whole subject of "Fraud upon Powers" belongs here. In a leading case, a life tenant, having the power to give his wife a jointure, bargained with her for part of it to himself, on which ground the jointure was set aside in equity.¹⁴⁴ And such would be the case where the donee, having a choice among the objects of the donor's bounty, sells that choice for money or other advantage to himself. It seems, however, that such fraudulent appointments, unless the deed of appointment showed the bargain on its face, would not be void at law; and a bona fide purchaser might hold a good title derived from such an appointment.¹⁴⁵ And so, under the doctrine that a tenant for life, holding a power in gross, may release it to the remainder-man, it has been held that he cannot sell it. The court will not permit a party to execute such a power for his own benefit.¹⁴⁶

Again, the donee cannot make a sale under a power in trust, with the understanding that he will buy it back from the purchaser, nor, indeed, under a beneficial power of sale, given for the purpose of using the proceeds for his greater comfort or support; for he might thus divert the land from those in remainder, though there is no necessity for a sale, and, in fact, without any actual sale.¹⁴⁷ A

("The doctrine has never been in force in Pennsylvania"); *Fronty v. Fronty's Ex'ts*, Bailey, Eq. (S. C.) 517. *Cowles v. Brown*, 4 Call (Va.) 477, merely says that the English equity courts have gone too far. *Melvin v. Melvin*, 6 Md. 541, recognizes the doctrine of illusory appointments. See, also, *Lippincott v. Ridgway*, 11 N. J. Eq. 526.

¹⁴³ Minnesota, St. c. 44, §§ 26, 27.

¹⁴⁴ *Aleyn v. Belchier*, 1 Eden, 132; 1 White & T. Lead. Cas. Eq. 384. And see notes to same for English cases.

¹⁴⁵ See Story, Eq. Jur. § 255. The objection to illusory appointments is purely equitable; and so as to appointments made by secret bargain, of which the purchaser might not know. See, of cases there quoted, *Cowper v. Earl Cowper*, 2 P. Wms. 748; *Hampden v. Hampden*, 1 P. Wms. 733; and those in notes 144, 146.

¹⁴⁶ *M'Queen v. Farquhar*, 11 Ves. 479.

¹⁴⁷ *McCreery v. Hamlin*, 7 Pa. St. 87.

quitclaim deed, given without any real consideration, does not execute a power of sale, but conveys only the donee's interest, where the appointment is to be by sale.¹⁴⁸ The execution may also be void as establishing a perpetuity, or as attempting to establish a void charity, though the power itself be not liable to either objection. The former can easily happen where children are born between the creation and execution of the power. When some of the devises made by the donee are set aside on this ground, the difficulty arises that the devisees cannot claim both under and against the donee's will; that is, they cannot claim under its valid devises, and at the same time as remainder-men under the deed or will of the donor, for want of a valid appointment. Suppose the appointment to the first child for life, with remainder to its issue, is valid, the child having been in esse when the power was raised, and the devise to the unborn second child with remainder over is void, the will would have to be set aside in toto, or the first child and its issue would get three-fourths of the estate; and it might be most correct to give an election to the first child, to let the will stand as far as it is good, on the terms of excluding it and its issue from the share unlawfully appointed.¹⁴⁹

As the law does not favor the defeat of appointments, a codicil making one that is unlawful by reason of perpetuity or otherwise, after a will making a valid appointment, may be disregarded, and the original will may stand.¹⁵⁰

Where a power of sale is given for purposes of reinvestment, it is plain that money, or securities on which money will be obtained, ought to be gotten in return for the land sold. Yet, if the purchaser have some adverse claim to the land, the donee of the power may, if acting in good faith, set off the estimated value of this adverse claim from the agreed price, and pass a good title.¹⁵¹

Generally where sales by fiduciaries are carried on under judicial approval or license, they are made at public outcry; but in Pennsylvania, under the construction put upon the statute, all executors

¹⁴⁸ *Grundy v. Hadfield*, 16 R. I. 579, 18 Atl. 186.

¹⁴⁹ *Albert v. Albert*, 68 Md. 352, 12 Atl. 11.

¹⁵⁰ *Austin v. Oakes*, 117 N. Y. 577, 23 N. E. 193.

¹⁵¹ *McComb v. Waldron*, 7 Hill (N. Y.) 335, in court of errors, reversing *Waldron v. McComb*, 1 Hill, 112, in supreme court.

and all trustees that are qualified in court must sell at public sale, even when empowered by a deed or will.¹⁵² But where such is not the case, and an administrator c. t. a. under the local law takes the place of an executor who declines, he can sell at public or private sale at his discretion, if such a discretion is conferred on the executor.¹⁵³ (Sales by license of the probate or orphans' court will be discussed elsewhere.)

In New York, however, at present the statute expressly authorizes executors (and by implication also administrators c. t. a.) to sell at either public or private sale, unless the power under which they act limits them in that respect.¹⁵⁴

A doctrine of cy-pres has been applied in a much-quoted and much-disputed English case, which will hardly be followed in America. A father, having by a family settlement reserved to himself the power to appoint an estate among his children, devised a part to a daughter for life, with remainder to her children, the latter not being among the permitted class. The court (Kenyon, M. R.) awarded an estate tail to the daughter, which came nearer to the intent of the settlement, as well of the will, than throwing the remainder after the life estate into intestacy.¹⁵⁵

§ 124. Aid in Equity.

It is said that equity will aid the defective execution, but will not aid the nonexecution, of powers; that is, in cases in which a court

¹⁵² *McCreery v. Hamlin*, 7 Pa. St. 87.

¹⁵³ Rev. St. N. Y. 1830 require sales of executor under power to be on notice and at auction; repealed in 1835 as to the state at large, in 1837 as to the city of New York; now regulated by act of 1883 (chapter 65), under which sales under testamentary powers, unless otherwise provided in the will, may be either public or private. See, on these statutes and the mode of selling, *McDermut v. Lorillard*, 1 Edw. Ch. 273; *Pendleton v. Fay*, 2 Paige (N. Y.) 202; *Richardson v. Sharpe*, 29 Barb. (N. Y.) 222. The act of 1880 is curative as to sales made before that time, when the state of the law was in doubt. Where the will authorizes a private sale, it may be made though the power devolves from several executors or one, or on an administrator c. t. a. *Wood v. Hammond*, 16 R. I. 98, 17 Atl. 324, and 18 Atl. 198.

¹⁵⁴ Laws 1883, c. 65; see Rev. St. 1889, pp. 25, 68.

¹⁵⁵ *Pitt v. Jackson*, 2 Brown, Ch. 52. *Contra*, *Smith v. Lord Camelford*, 2 Ves. Jr. 698.

of equity would give force to a defective instrument made by the owner of property, or would specifically enforce his contract to convey, such a court will also, in accordance with the lawful intent of the donee of a power, correct an instrument which in form does not accord with the demands of the power, or will enforce a contract to execute such an instrument.¹⁵⁶ The party in whose favor such aid can be given must be meritorious; in other words, there must be a valuable, or at least a good, consideration. According to the authorities, such meritorious party may be a purchaser,¹⁵⁷ which includes a mortgagee or a lessee; a creditor, or the creditors generally;¹⁵⁸ the wife, or a legitimate child, who has always a claim on the husband or parent,—and, this though a provision is already made for such wife or child;¹⁵⁹ or a charity.¹⁶⁰ But a husband, a natural child

¹⁵⁶ *Tollet v. Tollet*, 2 P. Wms. 489, 1 White & T. Lead. Cas. Eq. 374. Here a power was given to the husband, tenant for life, to make a jointure to his wife by deed. He made it by will under hand and seal. Relief was given to the widow. The doctrine as to who has a claim for relief against defective execution is set forth. 2 Sugd. Powers, pp. 93-99.

¹⁵⁷ *Schenck v. Ellingwood*, 3 Edw. Ch. (N. Y.) 175, where a consent was attested by one witness instead of two, as demanded; *Thorp v. McCullum*, 1 Gilman (Ill.) 615, 629 (a statutory sale by administrators, where the deed had none of the necessary recitals, though one administrator was the purchaser); *Mutual Life Ins. Co. v. Everett*, 40 N. J. Eq. 345, where, after a contract made by the trustee, the conveyance was made to the purchaser by the trustee's heir at law. See, also, *Marshall v. Stephens*, 8 Humph. (Tenn.) 159; *Roberts v. Stanton*, 2 Munf. (Va.) 124, 139. For a case of a business transaction, lienholders authorizing a new mortgage on given terms, and the trustee mistaking these terms slightly, where the mortgagee was relieved "in equity," see *Beatty v. Clark*, 20 Cal. 12. See, also, *Love v. Sierra Nevada L. W. Min. Co.*, 32 Cal. 653.

¹⁵⁸ *Johnson v. Cushing*, 15 N. H. 298, quoted section 116, note 12, may be put on this ground. *Dennison v. Goehring*, 7 Pa. St. 175, has been often quoted on this subject, but hardly belongs here. See Sugd. Powers, pp. 93-99, or Story, Eq. Jur. § 169, for English cases.

¹⁵⁹ *Kettle v. Townsend*, 1 Salk. 187; *Smith v. Baker*, 1 Atk. 385; *Hervey v. Hervey*, Id. 568; *Chapman v. Gibson*, 3 Brown, Ch. 229 (cases in which the wife or child were already provided for); and, arguendo, *Porter v. Turner*, 3 Serg. & R. (Pa.) 108.

¹⁶⁰ *Pepper's Will*, 1 Pars. Eq. Cas. (Pa.) 436, 446. The will was held not a good appointment as to the devises other than charitable. The case follows *Dormer v. Thurland*, 2 P. Wms. 506.

(otherwise, it seems, when such child inherits), a grandchild,¹⁶¹—in fact, any other relation than a child,—and, a fortiori, a stranger, are not entitled to any assistance; and the relation of purchaser, creditor, wife, or child must be borne, not to the donor of the power, but to the donee. A revocation under a power reserved by a settlor, if not in the prescribed form, will not be aided in equity.¹⁶²

An attempt to execute a power after it has fully expired, or before it has accrued, cannot be aided. This is rather a case of nonexecution.¹⁶³

Where the power is executed by fewer persons than those whose joining in or assenting to the execution is demanded, the question whether this is a mere defect to be aided in equity is left rather in doubt, with a slight predominance in favor of the position.¹⁶⁴

Conditions or terms that seem to have been inserted for the greater security of the estate can no more be disregarded by a court of equity than by a court of law; e. g. where the executor was authorized to borrow money from a bank on the credit of the estate, and to give liens for indemnifying indorsers, the chancellor refused to enforce a mortgage which he had given to a private lender, deeming the restriction to a loan from a bank a matter of substance.¹⁶⁵

Of course, where the execution is to be by will, the forms prescribed by the statute can no more be dispensed with than in any other will, for the will under a power must be admitted to probate.

In New York, and the other states which have codified the law of

¹⁶¹ Porter v. Turner, *ubi supra*; Lynn v. Lynn, 33 Ill. App. 299. These cases refer to those in which the ordinary jurisdiction of equity in supplying defective conveyances is made dependent on a valuable, or at least a good, consideration.

¹⁶² Lord Hardwicke in one case (*Wilkes v. Holmes*, 9 Mod. 485) aided a defective devise by the wife in favor of her husband's, the donor's, creditors, as well as in favor of her own creditors; but Mr. Sugden points out that the decision stands alone and unsupported.

¹⁶³ *Bakewell v. Ogden*, 2 Bush (Ky.) 265; *Howard v. Carpenter*, 11 Md. 259; *Johnson v. Cushing*, 15 N. H. 198. As to premature execution, see section 120, notes 90–94.

¹⁶⁴ *Roberts' Heirs v. Stanton*, 2 Munf. (Va.) 129. A majority of the judges seems to have sided with Fleming, J. See, also, *Norcum v. D'Oench*, 17 Mo. 98.

¹⁶⁵ *Ford v. Russell*, 1 Freem. Ch. (Miss.) 42.

powers, provision is made: "When the execution of a power in trust is defective, in whole or in part, under the provisions of [this chapter], its proper execution may be decreed in equity, in favor of the persons designated as the objects of the trust."¹⁶⁶ This would not reach the case in which a donee, having an unlimited power of devise or grant, has executed it faultily, in favor of a wife or child or creditor; for such a power is, under the statutory definition, not a "power in trust." However, the statutes common to these states also direct that when conditions merely nominal, and showing no intention of actual benefit to any one, are annexed to a power, they may be disregarded.¹⁶⁷

But where the donee is a married woman a formality imposed by the power, which is to guard her against undue influence, cannot be dispensed with.¹⁶⁸ That relief can be given only in equity is of importance even in states where the distinction in proceedings between law and equity is wholly done away with; for it means that relief will not be given against a purchaser for valuable consideration without notice, or wherever counter equities have to be considered.¹⁶⁹ This branch of equity is closely connected with one discussed in an earlier part of this work,—the informal execution of deeds by attorneys in fact, most usually when the attorney conveys in his own name, instead of that of the principal.¹⁷⁰ As equity interferes on the ground that by mistake the donee failed to carry out his intention, the intent to execute the power must clearly appear.¹⁷¹

¹⁶⁶ Minnesota, St. c. 44, § 57, and corresponding sections in other states; *Prentice v. Janssen*, 79 N. Y. 478.

¹⁶⁷ Minnesota, St. c. 44, § 46. No case seems to have been reported under this clause.

¹⁶⁸ *Reid v. Shergold*, 10 Ves. 370 (conveyance instead of will); *Hopkins v. Myall*, 2 Russ. & M. 86, and other cases quoted by White & Tudor (1 Lead. Cas. Eq. p. 194); *Williamson v. Beckham*, 8 Leigh (Va.) 20.

¹⁶⁹ White & Tudor, in their notes to *Tollett v. Tollett* (Lead. Cas. Eq. *190, *191), review the English authorities, according to some of which relief should not be given, even against the heir at law, if the faulty execution of the power would take from him the only provision.

¹⁷⁰ *Sinclair v. Jackson*, 8 Cow. 544, 588; *Lockwood v. Sturdevant*, 6 Conn. 387; *Story, Eq. Jur.* § 169 ("unless, indeed, such aid would, under all the circumstances, be inequitable to other persons," etc.).

¹⁷¹ *Lippincott v. Stokes*, 6 N. J. Eq. 122. *Ford v. Russell*, 1 Freem. Ch. (Miss.) 42, has been quoted to this point, but improperly. Here the executor

We have shown, in the first section of this chapter, that a power of selection, or a power to sell for a given purpose, often indicates a trust, or even a gift, in favor of those among whom the selection is to be made, or to whom the proceeds are to be paid. When the donee of such a power fails to execute it, a court of equity interferes, not to aid a nonexecution, but to enforce the trust implied, which cannot fail through the unwillingness of the chosen agent. In such cases it would be most natural for the chancellor to cause a division to be made by commissioners, or a sale by his master. However, a court has, in such a case, gone so far as to treat a sale made by a widow without the assent of the executor—which, under the will, she could make only with his assent—as a defective execution, which might, in favor of the purchaser, be aided and ratified in equity.¹⁷²

Where the instrument purporting to be made in execution is in excess of the power, such as a lease for 20 years where the donee is authorized to lease for no more than 10 years, a court of law might reject the execution in toto, being unwilling to split up the instrument into a valid and an invalid part, while a court of equity would give effect to it, as far as it was authorized; e. g. the 20-year lease for the first 10 years.¹⁷³

§ 125. Application of Purchase Money.

When the power of sale is undoubted, and is executed at the right time by the right person and in the right manner, the question still remains for the purchaser, whether he must see, himself, to the "apparently intended to execute the power, but the deviation from his authority was held material and not merely formal. In White & Tudor's text (volume 1, p. 192) a number of English precedents are quoted, in many of which the intention to execute the power was shown by other writings than those of execution, such as letters or covenants. See *Sergeson v. Sealey*, 2 Atk. 414. *Vernon v. Vernon*, 1 Amb. 4; *Mortlock v. Butler*, 10 Ves. 292; *Wilson v. Piggott*, 2 Ves. Jr. 351,—being the most accessible. The same precedents are found in 2 Sugd. Powers, 115–117.

¹⁷² *Norcum v. D'Oench*, 17 Mo. 98.

¹⁷³ 4 Kent, Comm. 107; 2 Sugd. Powers, 75, quoting several English cases which state the position by way of dictum, and *Roe v. Prideaux*, 10 East, 158, and *Campbell v. Leach*, 2 Amb. 740,—one at law and one in equity,—which are fully in point.

plication of the purchase money" to the purpose for which the donor has destined it. Of these purposes, the purchaser is always notified, for they are contained in the same instrument from which the power of sale is derived. If the holder of the power should unfaithfully divert the purchase money from its purpose, will the land still remain subject to the trust? A mortgagee who takes his mortgage under a power to incumber is in the same position as, and in fact is, a purchaser. The old rule in equity is this: When the exact amount of money which is to be applied to each purpose can be ascertained from the face of the instrument which contains the power of sale, the land remains liable in the hands of the purchaser, unless the contrary is clearly expressed; but if land is to be sold generally for the payment of debts, or of expenses, so that the amount does not appear, and the purchaser is not notified how much he must hold back for his security, he need not look to the application. However, whenever the purchaser knowingly co-operates with the trustee or executor who conducts the sale in withdrawing the proceeds from the persons or objects for whom or which they are intended, the land will remain bound, even though the sum to be applied is uncertain, or the instrument containing the power of sale should expressly have excused the purchaser from looking to the "application."

The doctrine of making the purchaser or incumbrancer look to the application of the purchase money or loan is based on the ground that he has notice of the trust for which the power is granted, and that the land, therefore, remains liable to it in his hands. Only the impossibility of following the proceeds of the sale or loan, where they are to be applied to unknown or uncertain purposes, or where by the nature of the trust they will have to remain for an appreciable time in the hands of the fiduciary clothed with the power, gives rise to exceptions; but these exceptions have gradually become so broad as to grow into the rule. The doctrine, as Mr. Justice Story shows, grew up in England when lands were not subject to simple contract debts.¹⁷⁴ Hence, when a will ordered lands to be sold, either for the payment of pecuniary legacies only, or of named and definite

¹⁷⁴ Story, Eq. Jur. §§ 1124-1135; Conover v. Stothoff, 38 N. J. Eq. 55; Dewey v. Ruggles, 25 N. J. Eq. 35. Gardner v. Gardner, 3 Mason, 178, Fed. Cas. No. 5,227, states the "settled distinction."

debts, the purchaser could easily protect himself by insisting on the receipts of the parties who were thus to be paid, and the land would remain liable if he failed to do so. But in this country, for nearly a hundred years, a decedent's land is liable for the payment of all debts alike, and, as legacies can only be paid after debts, the direction in a will to sell for the payment of legacies or for the payment of a named debt is practically a direction to raise money for all creditors alike, and unless there has been such a settlement of the estate as to estop the creditors, the purchaser could have no security in demanding the acquittances of the parties provided for by name. Thus the doctrine has almost fallen into disuse, and in many states the statute has relieved those who buy lands from an executor or other fiduciary under a power from all obligations to look to the application of the purchase money, except where the will or deed conferring the power indicates the donor's intent that the trust shall remain a charge upon the land.¹⁷⁵ A Pennsylvania statute protects the purchaser by providing a summary way in which he can deposit the purchase money in the orphans' court.¹⁷⁶ The American cases on the doctrine are few, and nearly all of them point in the same direction. South Carolina, at an early date, rejected the doctrine altogether.¹⁷⁷ In Massachusetts and Pennsylvania a legacy is not protected because the decedent's debts have priority over it.¹⁷⁸

¹⁷⁵ Kentucky, Gen. St. c. 113, § 23, applying only to devised lands, in all cases when the will does not expressly require otherwise. The following statutes refer to purchases under powers of sale in either deed or will: New York, Rev. St. pt. 2, c. 1, tit. 2, § 66; Indiana, § 2977; Michigan, § 5584; Wisconsin, § 2092; Minnesota, c. 43, § 22; Kansas, c. 114, § 9; Missouri, § 8601; California, Civ. Code, § 2244; Dakota, Civ. Code, § 1311; Georgia, § 2329; Alabama, Civ. Code, § 1843; New Jersey, Acts 1884, c. 9 (see Supp. Revision, 1886, p. 295, § 6); Mississippi, § 1839. In Georgia and Alabama, there is a proviso that the purchaser has not colluded with the unfaithful executor or trustee.

¹⁷⁶ For a contraction of the Pennsylvania statute of February 24, 1834, § 19, see Cadbury v. Duval, 10 Pa. St. 265.

¹⁷⁷ Duncan v. Edwards, 2 Desaus. Eq. (S. C.) 375; Redheimer v. Pyron, 1 Speer, Eq. (S. C.) 135.

¹⁷⁸ Andrews v. Sparhawk, 13 Pick. (Mass.) 393 (legacy alone); Grant v. Hook, 13 Serg. & R. (Pa.) 262 (debts and legacies, where Hannum v. Spear, 1 Yeates [Pa.] 553, is doubted); Dewey v. Ruggles, 25 N. J. Eq. 35.

Where a part of the proceeds is to remain with the executor as an investment, the purchaser is excused.¹⁷⁹

A power to "release," added in so many words to the power to sell, discharges the purchaser, but in most states it is implied in all cases.¹⁸⁰ The old distinction between a specific and a general charge has, however, been lately recognized in Virginia.¹⁸¹ But where the purchaser has not only notice of the trust (which one buying under a power of sale cannot help having), but has also notice of the violation of the trust by the donee of the power, the trust will follow the land into his hands; and the more so when he not only has notice, but co-operates in the violation of the trust by discharging the price of the land with his demand against the selling fiduciary, and thus deriving profit to himself from the breach of trust.¹⁸² This doctrine has given a great deal of trouble in Kentucky, under a statute that the proceeds of the land which is separate estate of a married woman shall be separate estate, when the conveyance or mortgage is made for the husband's prior debt, of which we have spoken in a former chapter.¹⁸³

¹⁷⁹ *Hauser v. Shore*, 5 Ired. Eq. (N. C.) 357.

¹⁸⁰ A power to the trustee to convey and release means that the purchaser need not look to the application of the purchase money. *Bates v. Woodruff*, 123 Ill. 205, 13 N. E. 845. In *Wagner v. Blanchet*, 27 N. J. Eq. 356, a deed of trust with power to sell or incumber expressly required that the purchaser should look to it that the cestui que trust should get the proceeds.

¹⁸¹ *Hughes v. Tabb*, 78 Va. 313, following *Potter v. Gardner*, 12 Wheat. 498.

¹⁸² *Wormley v. Wormley*, 8 Wheat. 422 (where the purchasers from the first purchaser were also privy to the fraud, and were decreed to give up the estate); *Nicholls v. Peak*, 12 N. J. Eq. 69 (purchaser held to have notice of the fraud because the seller, who held one-seventh in trust, had incumbered the whole estate). In *Hauser v. Shore*, 5 Ired. Eq. (N. C.) 357, setting off the executors' debt to the purchaser was not considered a fraud, because such debt was less than their shares.

¹⁸³ See section 105 on "Separate Estate." Compare the freedom of the purchaser in *Daubert v. Eckert*, 94 Pa. St. 255.

CHAPTER XI.

THE REGISTRY LAWS.

- § 126. The Recording Office.
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§ 126. The Recording Office.

The recording of deeds affecting land, or, as the English prefer to call it, the "registry of assurances," is the universal law and custom throughout the United States, and has been such almost from the first settlement of each of the colonies. It is often called "registering," and many of the statutes speak of a "registry" or "registration." But when the English statutes prescribe the registering of deeds in the counties of York and Middlesex, the deed is not copied at length, but only a short memorandum is made, containing the name of grantor and grantee, and identifying the land affected; while the American laws at present, though they did not always, provide for transcribing the conveyances, mortgages, and other deeds that are to be made public in full upon the record books, as the statute for the enrollment of deeds of bargain and sale required it in England. Hence, "recording" is perhaps a more correct word than "registration." While the statute of enrollment was evaded and made a dead letter through the unwillingness of the English landholding aristocracy to lay their intricate family settlements bare to the public eye, so that even the registry of a "memorial" as a warning to purchasers did not pass much beyond the two counties of York and Middlesex, no such motives were at work in the colonies, but every one felt the utility of a system known in theory at least

to the English, and which the Dutch settlers in New York brought with them to their new homes.¹

Excepting Connecticut, Rhode Island, and New Hampshire, where the town clerk records the deeds of each town, the county is the unit for recording all instruments relating to land. The officer charged with the duty is known by various names. In some states the duty of receiving and recording deeds is incident to an office primarily established for another purpose. Thus we have a "register of deeds" in Maine, New Hampshire, Massachusetts, Michigan, Wisconsin, Minnesota, Kansas, Nebraska, and the Dakotas, and in the District of Columbia; a "register" in North Carolina and Tennessee; a register of mesne conveyances (to distinguish from the register of land patents) in South Carolina; a recorder in Pennsylvania, West Virginia, Indiana, Illinois, Arkansas, California, Colorado, Idaho, and Montana; a recorder of deeds in Delaware and Missouri; a county recorder in Ohio, Iowa, Nevada, and Oregon. The clerk of the county records deeds in New York (but a register in the city of New York); the clerk of the court of common pleas in New Jer-

¹ Chancellor Kent (4 Comm. 456), on the authority of Holmes' Annals, traces the recording of deeds in Massachusetts back to 1641; in the Plymouth colony to 1636; in Connecticut to 1639; in New Jersey to 1676, 1683, and 1698. It has been lately surmised, and perhaps proved, that the Pilgrim Fathers brought the happy idea of recording their conveyances from Holland. The first recording act in Virginia was passed in 1639 (see 1 Hen. St. p. 227); in Pennsylvania, in 1715, by an act still in force ("Deeds," etc., 1). In New York the practice of acknowledging and recording deeds existed already under the Dutch government, and was continued by the Duke's Laws in 1665. The Maryland registry law of 1692 was in force till 1785. In North Carolina an act of 1715 made the registry of the deed a prerequisite for passing the title. All the colonies had recording laws before the Revolution, and in the new states the recorder's office was one of the first institutions organized by the newcomers; in California, before any legal government. A history of the colonial registry laws in New Jersey is given in Read v. Richmand, 13 N. J. Law, 49. A clear trace of recording deeds can be seen in the book of Jer. c. xxxii., 14, the counterpart of the deed in the earthen vessel being evidently left therein for public inspection. The system of the "registry of assurances" is, however, wholly different from the registry of titles in vogue in Germany and Switzerland, where the ownership of lots of land is transferred on the *grundbuch* (ground book) very much like shares on the stock book of a corporation. The English statute of enrollment was never in force in this country. Givan v. Doe, 7 Blackf. (Ind.) 210.

sey; the clerk of a county or corporation court, or of the chancery court of Richmond, in Virginia; the clerk of the county court in Kentucky and Texas; the clerk of the circuit court in Maryland and Florida; the clerk of the chancery court in Mississippi; the "judge of probate" in Alabama; the clerk of the superior court in Georgia; the county auditor in Washington.² The recorder, as such, even though he unite in himself the office of probate judge, is a ministerial officer; but in Virginia and in Texas the recording of a deed may still be ordered by the court. Formerly, in all the states or colonies, deeds were thus ordered for record pretty much like wills.³ Being a ministerial officer, he has the power to appoint deputies, either by force of the common-law principle or under the express words of the local statute; and in the large cities, of course the great bulk of the recorder's work is done by deputy.⁴ In North Carolina anciently the county court, later the judge of probate, and since the enactment of the present Code the clerk of the superior court, who is in great part such a judge under the present constitu-

² We give the style of the office under which recording is done. Under the laws of some states, an official elected for another purpose performs the duties pertaining to the registering or recording of deeds in some counties, e. g. in Illinois the clerk of the circuit court in all counties of less than 60,000 inhabitants; but he is the "recorder." In Nebraska the county clerk is the recorder in counties not exceeding 18,003 souls.

³ Such is the state of the law now. But under the colonial acts of Virginia, North Carolina, and Kentucky, and down to the earlier years of the nineteenth century, the theory of those states and of Tennessee was that the county court, composed of the several justices, acted judicially in admitting a deed to record; and only gradually the duty was shifted from them to their clerk. The Virginia acts of 1748 and 1785 (in force in 1787) proceed on this theory; and the latter allows also the "general court" at Richmond, and for the Western lands the district court for Kentucky, to order a deed to record, irrespective of the site of the land. This judicial power is narrowly limited. See *Elliott v. Peirsol*, 1 Pet. 328 (the court has no jurisdiction to make an order changing an acknowledgment). The register is not a judge, and cannot refuse to record a deed because he may deem it void. *Clague v. Washburn*, 42 Minn. 371, 44 N. W. 130.

⁴ E. g. Tennessee, Code, § 527 (one deputy); Missouri, § 7461 (unrestricted). The trouble in Kentucky growing out of deputies of the county clerk taking acknowledgments in their own name has been treated elsewhere. See the curious case of the void registry of a deed made by a clerk appointed by the treasonable "provisional government." *Simpson v. Loring*, 3 Bush (Ky.) 458.

tion, has to pass upon the proof or acknowledgment of a deed for lands in his county, whether such proof or acknowledgment be made before him or before a justice, notary, or other officer. He then orders the deed to "probate," like a will, and delivers it to the register for recording in the proper deed book. Thus the ministerial work of the latter has no admixture of judicial discretion.⁵

Under the modern registry acts the exact time of "lodging for record" is generally material. The first duty of the officer in charge is to enter the deed on the "entry book," and to mark it with the day, hour, and minute at which he received it.⁶ The entry book is, in most cases, a "small index,"—i. e. an index to a single volume,—and is arranged in two parts, one by the name of each grantor, the other by the name of the grantees; the former being by far the most important. The searcher of a title can here find a reference to a deed before the register has found time actually to copy it into the proper book. Besides the names of grantor and grantees, each entry contains the date of lodging; the number of the volume is put on the cover of the index; the number of the page is added after the instrument is transcribed. Formerly this was all. But during the last 30 years—in some states for even a longer period—the laws have directed the insertion in the small index or entry book of a short description of every tract which is conveyed or pledged in the deed, as otherwise the search would be too wearisome, where the grantor is a trader in lands, who makes his deeds by the score, or even by the hundred.⁷ The transcription of the

⁵ The power of the clerk of the superior court is judicial, and cannot be exercised by deputy. His jurisdiction is limited, and, if the facts appearing are not such as the law (Code, § 1245) directs to be proved, his probate is void, and the deed is deemed not to be recorded. With the same strictness the orders of the probate judge in probating deeds were formerly treated. Record by a temporary chancery clerk in Mississippi held good. *Cocke v. Halsey*, 16 Pet. 71.

⁶ In many of the states the provision about marking the exact time is found among the duties of the recorder or register of deeds. See, for instance, Minnesota, c. 8, § 177 (under title "Registers of Deeds"), giving form of grantor's and grantees' reception books, of which first column is headed: "Date of reception, year, day, hour, and minute;" Wisconsin, § 758, subd. 5 (day, hour, and minute of reception to be indorsed on the deed).

⁷ Assessment maps are, however, directed to be made by the charters of many cities (for instance, at Louisville, Ky.), and are found very useful in

"small indexes" into larger ones, in which the grantors and grantees named in a number of deed or mortgage books are put into close alphabetical order, is made in the more populous counties, and is often a necessity, but is not an inherent part of the system.⁸

When the purchaser hands his deed to the register, and pays the fees, he has done all he can do. The entry on the index, under the name of each grantor, with date and short description, is the duty of the officer. And within a reasonable time it is his further duty to transcribe the deed (or cause it to be done; not necessarily by a deputy) in the proper book, the law generally providing separate books for deeds affecting lands and those which affect personality; in some states also for absolute deeds and for mortgages, and again for letters of attorney.⁹ In many of the latest statutes the recorder or register of deeds is directed by the law to record everything which bears on the title to land,—deeds, mortgages, powers of attorney,

tracing titles and locating lots. In Nebraska, a "numerical" index is required to be kept, i. e. the register of deeds has to keep up a separate history of every quarter section, or quarter quarter section, somewhat like the grundbuch in Germany; but the rights of purchasers and creditors are not in any way made to depend on these maps, or on the section book of the Nebraska statute. Several revisions have a chapter on the "Recorder" or "Register," apart from that on "Deeds" or "Conveyances," in which the details of the office work are prescribed; e. g. 2 Rev. St. Mo. c. "Recorder." In many states the entry book and the small index are separate books; e. g. in New Hampshire, Minnesota, Texas, Arizona, Colorado, and Wyoming. A good example of the "entry book or index" is given in St. Iowa, § 1943, thus: (1) The grantor; (2) the grantee; (3) the time when the instrument was filed; (4) the date of the instrument; (5) the nature of the instrument; (6) the book and page where the record thereof may be found; (7) the description of the land conveyed. Indexes were not recognized by law in Pennsylvania till 1827. An index must be so kept that persons accustomed to making searches can understand them; not necessarily that every man can. *Smith v. Royalton*, 53 Vt. 604.

⁸ In some states the general index takes in instruments of all kinds.

⁹ In Tennessee, the deed is not "lodged for record" till it is entered on the "entry book." *Wilson v. Eifler*, 11 Heisk. (Tenn.) 179. In other states, the deed is lodged for record when the register indorses the hour and minute on it. Rhode Island, St. c. 173, § 5. Even where actual recording, not lodging for record, gives validity to the deed as against third party, it takes effect at the first moment when the register begins to record it. *Metts v. Bright*, 4 Dev. & B. 173.

ney, executory contracts, releases of mortgages, judgment liens, lis pendens, mechanics' liens, deeds referring to mining claims, to possessory rights, etc., with a separate index for each kind of instrument, and a general index for all. The statute of Idaho, with its 26 subsections, only a few of which relate to rights in chattels and effects, is the best example.¹⁰ On the other hand, in Ohio, Michigan, Wisconsin, and Minnesota, and also in the city of New York, an assignment for the benefit of creditors is delivered to the judge of the probate court or to the clerk of the circuit, as the case may be, for record, and takes effect from the time when it is delivered to that officer, or other required steps are taken in his office.¹¹

While we cannot go into the details of these statutes, we may state generally that where separate books are provided for absolute deeds and for mortgages, or for conveyances and executory contracts, or for instruments which affect the land and powers of attorney, the recording of an instrument belonging to one class in a book devoted to another is not a compliance with the registry law, and may wholly fail to bring about the results flowing from lawfully recording the instrument. We shall show elsewhere on whom the loss will fall if by accident, or by the fault of the recording officer, a deed properly lodged for record is recorded incorrectly, or not at all, or in the wrong book, or is not indexed, or is badly indexed.¹² The law does not, as far as we have noticed, provide another temporary officer to record those deeds to which the "register" or "recorder" is a party. Hence the record made of such a deed by the regular officer is valid for all purposes; and there is certainly no reason why it should not be notice to purchasers.¹³ The statute often prescribes that no deed shall be considered as being lodged for record until the fee for the same, or some tax imposed by the state upon the recording of

¹⁰ Idaho, Rev. St. § 2024. The Tennessee Code, § 2837, also enumerates 19 instruments or steps affecting land to be recorded and indexed by the register.

¹¹ Ohio, Rev. St. § 6335; Michigan, St. § 8739 (with clerk of circuit court); Wisconsin, §§ 1693–1697 (in the circuit court, or with its judge); Minnesota, St. c. 41, § 23. See act of 1877, c. 466, § 2, as to New York City.

¹² A fortiori where a deed is put into an old record book, filed and laid away for years, where no one would look for it. Sawyer v. Adams, 8 Vt. 173.

¹³ Brockenborough v. Melton, 55 Tex. 493, 500; Tousley v. Tousley, 5 Ohio St. 78 (record signed by pro tem. recorder).

deeds, is paid. But as the recording officer is made the collector of the tax, and is the recipient of the fee, the failure to pay the fee or tax cannot be objected to the entering of the deed on the entry book, and even less to its registry, if it is actually spread upon the record; for its being so entered or spread would simply show the willingness of the recording officer to assume the tax, or to give credit for the fee.¹⁴

There can, of course, be no constitutional objection to retrospective laws curing the defective registry of deeds; that is, making it notice to purchasers buying after the law, or proof of the execution of the deeds, which, for want of a proper acknowledgment, or for other causes, it might not have been before.¹⁵

The recording laws have been introduced gradually; that is, they have been extended to instruments which were not liable to them theretofore, or the time within which deeds might be recorded and still relate back to their date has been shortened from time to time, as the exigencies of commerce in land required. Such laws have often had a retrospective effect; that is, the holder of an unrecorded conveyance has been told by the legislature, "Unless you will put your conveyance on public view within a given time, it will be postponed to subsequent purchasers without notice." Such laws have generally been sustained as constitutional against the objection that they impair the obligation of the executed contract, which the deed of conveyance undoubtedly is.¹⁶

The objects of the registry laws are twofold: First and foremost, to lay the ownership of land, and of all estates therein and liens thereon, open to all whose interest it is to know it. We do not here regard the state or city who wishes to tax the land, but simply those

¹⁴ Ridley v. McGehee, 2 Dev. (N. C.) 40. See Kentucky, St. 1894, § 520 ("no deed held to be legally lodged for record till the tax be paid thereon"); Phillips v. Clark, 4 Metc. (Ky.) 348; Boston v. Cummins, 16 Ga. 109.

¹⁵ Wallace v. Moody, 26 Cal. 387. There are quite a number of such acts in Arkansas, the necessity for them growing out of widespread mistake as to the statutes in force on the subject. Minnesota also has passed a number of such acts.

¹⁶ Jackson v. Lamphire, 3 Pet. 280, 290. Perhaps, as the act in question was something more than a recording law, it also gave ample time to persons under disabilities. Tucker v. Harris, 13 Ga. 1 (fair time allowed); Clark v. Troy, 20 Cal. 219 (deeds made before conveyance act must be recorded).

who propose to buy the land, or lend money upon its security, both of which classes are comprised under the name of "purchasers for a valuable consideration" (though some statutes name mortgagees or incumbrancers expressly), and those who, on the strength of value of the land, extend credit to the apparent owner. The laws of all the states protect the former (purchasers), when they have no notice, against unrecorded deeds of sale or incumbrance. Only a few states give an effective protection to creditors. The other object of recording is to put the deeds through which the purchaser derives his title in a permanent shape. The transcript on the deed books, or a certified copy therefrom, may at any time be used to prove the execution and contents of the deed.

We have in a preceding chapter shown how the solemnity of recording is in some states made a requisite for passing the title, at least when it is conveyed by married women; and, in other states, for barring an entail. On the other hand, it must be borne in mind that recording cannot make a conveyance valid that was void before, for want of delivery, or for want of capacity in the grantor, any more than a forged deed can obtain force if by fraud or perjury it should find its way into the public deed books.¹⁷ With a very few exceptions, now almost obsolete, and stated elsewhere, an unrecorded deed, if otherwise fully executed and delivered, passes the legal title (except in North Carolina), as between the parties; and the land in the hands of the owner is subject to dower and to execution for debt. A title arising from an unrecorded deed is itself subject to the recording laws.¹⁸ And, in the absence of fraud or equitable

¹⁷ Stone v. French, 37 Kan. 145, 14 Pac. 530, quoting Tisher v. Beckwith, 30 Wis. 55; Van Amringe v. Morton, 4 Whart. (Pa.) 382; Berry v. Anderson, 22 Ind. 37 (though the recording may be proof of delivery. Colee v. Colee, 122 Ind. 109, 23 N. E. 687. And see chapter "Deeds," sec. "Delivery"); Oglesby v. Hollister, 76 Cal. 136, 18 Pac. 146 (deed void on its face). So, as to unrecorded mortgages in Ohio, in section "Mortgages, Releases, etc."

¹⁸ Coward v. Culver, 12 Heisk. (Tenn.) 540; Wright v. Tichenor, 104 Ind. 185, 3 N. E. 853, following Johnson v. Miller, 47 Ind. 376; contra, Alexander v. Herbert, 60 Ind. 184 (where the deed to the husband was returned and destroyed before registry, and a subsequent purchaser from the former owner, for value and in good faith, was allowed to hold the land free from the wife's third part, the Indiana substitute for dower). Wood v. Chapin, 13 N. Y. 509, passes on recording as well as on the provision for acknowledgment or

estoppel, the length of time during which a deed remains unrecorded is immaterial to its effect as such unrecorded deed.¹⁹

§ 127. What Instruments are Recorded.

The two advantages of a recorded deed—notice to all persons dealing with the same grantor and the same land, and that the transcript is good evidence—the grantee in any instrument bearing upon land might wish to gain for the small recording fee; but, unless the instrument is such as the law requires to be recorded, putting it on the record is of no avail for either purpose. And though it be in its nature recordable, it must also carry such acknowledgment or proof as the law requires with it, before it can be effectively recorded.²⁰ It was held in Virginia and Kentucky, under the acts of the

attestation. The grantor cannot keep a delivered deed from the record because the purchase money is not paid. *Contra, Thomas v. Thomas*, 10 Ired. (N. C.) 123.

¹⁹ *Leger v. Doyle*, 11 Rich. (S. C.) 109.

NOTE. Within a few days, before the manuscript of this work was sent on for publication, the Torrens land-title bill was passed by the Illinois legislature, to be voted on separately by the voters of each county, and to be introduced in those counties which may adopt it. The act was published in full in the Chicago Tribune of June 15, 1895, and in several magazines. It is founded on the lines of the German grundbuch, and more closely on the "Australian system of registry of titles." The transfer on the book is in itself the conveyance, not merely the record of a conveyance already made in pais. The great difficulty will be to start the new domesday book, showing who at this time owns every lot, with what future estates limited upon it, and subject to what mortgages and liens. A peculiar feature of the bill is the raising of an insurance fund from the registration fees, out of which the state is to insure the title, if through any default in the registering officers it should, after a named time, turn out defective. It seems, from a hasty examination of the act, that land can only be brought under the operation of the law by the voluntary action of the owner. As long as no county has adopted the new system, and no land owner has submitted his lands to its operation, it would be too early to treat the matter seriously; and we therefore abstain from giving any analysis of the act.

²⁰ "It is not every document in writing which may have some effect in establishing or overthrowing a title to land which can be recorded. The written admission of a fact by a party claiming an interest in lands may materially impair his right or title; but, even if it were under seal, its record

former state of 1748 and 1785, and the early acts of the latter, that nothing but the legal transfer of a legal estate can be recorded (not even a second mortgage, for this is but the assignment of an equity); and the Kentucky statute did not clearly put an end to this doctrine till 1852, when the revisers, in the recording law, spoke of "an interest in land," and, as to mortgages, of a "title, legal or equitable."²¹ But, at any rate, the title gained by an unrecorded deed is a legal title, and a deed conveying or incumbering it ought to be recorded.²² Other states did not scan so closely the grantor's estate which his deed conveyed;²³ but the conveyance itself had to be one fitted to

would be no notice to purchasers." *Ludlow v. Van Ness*, 8 Bosw. (N. Y.) 178, 188, quoting *Jackson v. Richards*, 6 Cow. 617. And see *Corn v. Sims*, 3 Metc. (Ky.) 391, under a broad statute; *Ramsey v. Riley*, 13 Ohio, 157; *Villard v. Robert*, 1 Strobl. Eq. (S. C.) 393; *Com. v. Rodes*, 6 B. Mon. (Ky.) 171; *Brown v. Budd*, 2 Ind. 442; *Dutton v. Ives*, 5 Mich. 515.

²¹ The old Virginia acts began: "No estate of inheritance," etc. *Bank of Kentucky v. Vance's Adm'rs*, 4 Litt. (Ky.) 168; *Nelson's Heirs v. Boyce*, 7 J. J. Marsh. (Ky.) 404; *Averill v. Guthrie*, 8 Dana (Ky.) 82. Aliter under Act Ky. 1837. *United States Bank v. Huth*, 4 B. Mon. (Ky.) 449. It had been argued that the statute required recording against a purchaser; and only the legal estate can be purchased. Alabama at first held the deed of an equity unfit for record. *Falkner v. Jones*, 12 Ala. 165 (assignment of land certificate); *Fenno v. Sayre*, 3 Ala. 455. The Irish registry act and that for the West Riding of York have never been so narrowly construed. *Credland v. Potter*, L. R. 18 Eq. 350. The Middlesex act (7 Ann. c. 20) speaks of deeds "whereby * * * any lands * * * may be any way affected in law or equity,"—from which words those of the broader American statutes are taken. In South Carolina an unsealed writing is not recordable; for there must be an affidavit of "execution"; and such a paper has not been executed within the meaning of the law. *Arthur v. Screven*, 39 S. C. 78, 17 S. E. 640.

²² *Wood v. Chapin*, 13 N. Y. 509; contra, *Martindale v. Price*, 14 Ind. 115. *Gatewood v. House*, 65 Mo. 663 (assignment of United States land certificate may be recorded); contra, *Moore v. Hunter*, 1 Gilman (Ill.) 317. In Nevada, by St. §§ 3738-3745, possessory rights on public lands are transferred by plats and recordable deeds. So in Idaho, § 2024, subsec. 12; and Colorado (*Gillett v. Gaffney*, 3 Colo. 351). Contra, *Clark v. Gellerson*, 20 Me. 18.

²³ An old Maryland case embraces deeds of equitable estates, *United States Ins. Co. v. Shriver*, 3 Md. Ch. 381. The deeds of the lord proprietor were not recorded in the common registry. *Calvert v. Eden*, 2 Har. & McH. (Md.) 335. So it is with deeds by the state or United States. *Rhinehart v. Schuyler*, 2 Gilman (Ill.) 473; *Sands v. Davis*, 40 Mich. 14. Lien notes are recordable in Texas. *Brown v. Thompson*, 79 Tex. 58, 15 S. W. 168. Many of the West-

pass the legal title. An executory contract for the sale of land, or declaration of trust, either of which a court of equity could, under the old theory, only adjudge by taking hold of the defendant's conscience, and enforce by process of contempt, did not fall under any of the old registry or recording laws.²⁴ And in the absence of an express provision in the statute, such as has in modern times been made in a number of states, even now the recording of a "title bond" or like instrument would be of no avail as notice; the theory of the registry laws, in connection with the equity doctrine of purchaser for value, being this: a conveyance of the legal title loses its priority by not being put on record, as against subsequent purchasers; but the registry of a writing which creates an equitable title is not notice in itself of the equity created by it. The English doctrine has, however, been so far modified in the United States that, wherever the statute authorizes an instrument to be recorded, the record is notice.²⁵

The language of the laws in force in our day differs greatly. The broadest and simplest is employed in the statutes of Illinois, Missouri, Arkansas, Nebraska, and Kansas, which require the recording of all "deeds, mortgages, etc., and other instruments relating to or affecting any real estate," or "whereby any real estate may be affected." South Carolina uses more verbiage, but aims to cover the

ern states allow United States land patents to be recorded in order to have ready means of proof.

²⁴ Loomis v. Brush, 36 Mich. 40 (deed void at law, registry not notice of equities resulting); Tarbell v. West, 86 N. Y. 280 (conveyance of an equitable title is notice to future purchasers thereof, not to those of the legal title); contra, Wilder v. Brooks, 10 Minn. 50 (Gil. 32). A deed unsealed, when seal necessary to pass title, held recordable in McClurg v. Phillips, 57 Mo. 215. Certificate showing that certifier has conveyed already is recordable. Peterson v. Lowry, 48 Tex. 408. An acknowledgment by a grantee that the purchase money is unpaid is a "conveyance." Melross v. Scott, 18 Ind. 250.

²⁵ Mesick v. Sunderland, 6 Cal. 297 (under the first registry act); Beverly v. Burke, 9 Ga. 440, 14 Ga. 70 (title bond not a "conveyance"). But, as to whatever is recordable, the record is notice; see, for instance, Minnesota, St. c. 40, § 28. Wisconsin, §. 2245, as to bonds and contracts. Indiana, Rev. St. § 2957, authorizing the registry of contracts, does not declare it notice; but it is held to be such. Case v. Bumstead, 24 Ind. 429. For the English (or Irish) doctrine, see Latouche v. Lord Dunsany, 1 Schoales & L. 157; Bushell v. Bushell, Id. 90, quoted by Chancellor Kent (4 Comm. 174).

same ground. All instruments creating a trust in regard to real estate, or charging or incumbering the same, are embraced. The definition in Idaho, though short, is comprehensive. Montana directs both conveyances and agreements to convey to be recorded. California is so careful to enumerate all writings affecting land that they wind up with excepting wills, and leases not over one year. Virginia, deviating very far from her old narrow standard, records "contracts, in consideration of marriage, for the conveyance or sale of estates, deeds conveying any estate or term, deeds of gift, deeds of trust or mortgage," which includes almost everything; while West Virginia, in shorter words, is perhaps broader: "Deed, contract, power of attorney or other writing." In Wisconsin, one section provides for recording conveyances; another for every "bond or contract for the sale or purchase of land, or concerning any interest in land," if under seal and attested by two witnesses and acknowledged. In Kentucky, since 1893 (while formerly only conveyances and mortgages were recordable), the law embraces also contracts for the sale of land or an interest therein. In Indiana, executory contracts are excluded from the definition of "conveyances," but are made recordable by a separate section of the law.²⁶ New York, Minnesota, and the Dakotas require that all conveyances be recorded; and after defining "conveyances," with much fullness and verbiage, as meaning any instrument by which the title to land is in any way affected, they except leases for not over three years, and executory contracts for the sale and purchase of land. This very important exception brings these states nearer to the last than to the first group of states. The Nevada definition of "conveyance" is also very broad, but does not seem to include executory contracts.²⁷

On the other hand, the following states confine recording to nar-

²⁶ Illinois, Rev. St. c. 30, § 30; Missouri, Rev. St. § 2418; Arkansas, Dig. § 664; Nebraska, § 4342; Kansas, § 1128; South Carolina, § 1776; Montana, Gen. Laws, § 258; Idaho, § 2900; California, Civ. Code, §§ 1214, 1215; Colorado, Gen. St. § 215; Virginia, § 2463; West Virginia, c. 73, § 2; Wisconsin, §§ 2233, 2241; Kentucky, St. 1894, § 500; Indiana, Rev. St. §§ 2956, 2957; Case v. Bumstead, 24 Ind. 429.

²⁷ New York, Rev. St. pt. 2, c. 3, §§ 1, 38; Minnesota, c. 40, § 26; Dakota Territory, Civ. Code, §§ 671, 672, quære. as to Nevada, § 2644.

power limits: Maine and Massachusetts to "a conveyance in fee, fee tail, for life or a term of years" exceeding seven; New Hampshire, "a deed of bargain and sale, mortgage, or other conveyance of real estate," with a like exception of short leases; Vermont, to "deeds, leases, and other conveyances of land"; Rhode Island, to "bargains and sales, and other conveyances for a freehold inheritance or term of years" over one year; Connecticut, to "conveyances," mortgages being specially named in another place; Pennsylvania, to bargains and sales, deeds and conveyances, and mortgages; New Jersey, to a deed or conveyance of lands, tenements, or hereditaments," and to "mortgages and deeds of trust"; Ohio, to "deeds or instruments in writing for the conveyance or incumbrance of any lands," etc.; Michigan, to every conveyance of real estate (including, as appears elsewhere, mortgages and assignments of mortgages); Maryland, to "a deed of real property"; Delaware, to "a deed or letter of attorney," executory contracts being excepted; Georgia, to every deed conveying land; Florida, to "conveyances of real property, mortgages, and deeds of trust," requiring also the defeasance of an absolute deed to be recorded; Mississippi, to "a conveyance of land"; Oregon, to "every conveyance of real estate"; Washington, to "all deeds and mortgages." In Texas, the transfer of an equitable estate in land should be recorded as a conveyance.²⁸

The word "deed," it seems, should in these statutes be taken in its popular sense, as an executed conveyance of the owner's title in land, or of a freehold estate therein, not in the technical sense of a sealed instrument in general, which would include a lease or a bond.²⁹

²⁸ Maine, c. 73, § 8; Massachusetts, c. 120, § 4; New Hampshire, c. 137, § 4; Vermont, § 1953; Rhode Island, c. 173, § 4; Connecticut, § 2961; Pennsylvania, "Deeds & Mortgages," 19, 40; New Jersey, "Conveyances," 13, 14; Ohio, Rev. St. 4134; Michigan, Rev. St. § 5683 (see *Burns v. Berry*, 42 Mich. 172, 3 N. W. 924); Delaware, Laws, c. 83, § 14; Maryland, art. 21, § 15; Georgia, § 2705; Florida, § 1972; Alabama, §§ 1810, 1811 (see *Monroe v. Hamilton*, 60 Ala. 226; *Bailey v. Timberlake*, 74 Ala. 221; Mississippi, § 2457; Oregon, Hill's Ann. Code, § 3027; Washington, Gen. St. § 1439; *Lewis v. Johnson*, 68 Tex. 448, 4 S. W. 644 (transfer of located land warrant). Patents from this state may be recorded but need not. *Evitts v. Roth*, 61 Tex. 81.

²⁹ Thus, in states where mortgages are recorded separately, the record books for absolute deeds are known as "Deed Books." "I assign the with-

A mortgage is often contained in two separate writings; one of them drawn as an absolute deed, the other being a defeasance of the first in case a sum of money should be paid at a given time. Many states provide by statute that a defeasance in a separate paper must also be recorded; otherwise a purchaser in good faith from the grantee in the deed, absolute on its face, will take a title clear of the defeasance.³⁰ And it seems that even in the absence of a statute to that effect, defeasances have been deemed fit instruments to be recorded.³¹ Assignments of mortgages, either by statute or on grounds of reason and common law, are fit to be recorded.³² It would, of course, be unjust to give the force of proving itself to the record of an instrument which had never been proved to the recorder, and which that officer ought never to have spread on his books. And, as an instrument is either properly or improperly recorded, the rule has sprung up that wherever, for want of proof or acknowledgment, the deed ought not to have gone on the books, and cannot be used as proof, it is to be considered as not recorded for any purpose,—i. e. such deed is not constructive notice to purchasers and creditors. It may be actual notice; that is, if it can be shown that the subsequent purchaser has actually read the unlawfully recorded deed, he could not be said to purchase in good faith any more than if somebody had told him about the deed. But

in," etc., indorsed on a recorded deed, can be understood by the description therein, and is a recordable deed. *Harlowe v. Hudgins*, 84 Tex. 107, 19 S. W. 364.

³⁰ New York Rev. St. pt. 2, c. 3, § 3. And it has been held that, if the absolute deed is recorded, and the defeasance withheld, the mortgage made up of the two is deemed unregistered. *Dey v. Dunham*, 2 Johns. Ch. 182; *Johnson v. Wheelock*, 63 Ga. 623; *Hendrickson's Appeal*, 24 Pa. St. 363; *Friedley v. Hamilton*, 17 Serg. & R. 70. In Minnesota the deed may be put in deed book; the defeasance in the "miscellaneous" book. *Benton v. Nicoll*, 24 Minn. 221. For other statutes as to recording defeasances, see New Jersey, "Mortgages," § 21; California, § 2950; Dakota, Civ. Code, § 1740, 1741; Massachusetts, c. 120, § 23; Maine, c. 73, § 9; Indiana, § 2932; Michigan, § 5686; Wisconsin, § 2243; Minnesota, c. 40, § 23. See, also, statutes of Oregon, Maryland, Alabama, Nebraska, Wyoming, Kansas, and Pennsylvania.

³¹ *Clark v. Condit*, 18 N. J. Eq. 358, under a statute which does not name defeasances as recordable writings.

³² New York, Rev. St. pt. 11, c. 3, § 37, and similar sections in laws of states following New York legislation.

he is not affected, aside of such knowledge, by the copy of a deed on the register's book, when such copy was put there without sufficient warrant. This has been decided everywhere;³³ but it is not the law of Illinois, because, ever since 1817, under a statute (wisely enacted in view of the many technical points that were raised on acknowledgments) a deed recorded on insufficient proof or acknowledgment is nevertheless notice to purchasers and creditors, though the transcript cannot be offered in evidence; but the original must be proved as if it had never been recorded.³⁴ A similar statute was enacted in Missouri in 1841, again in 1855, and retained in the Revision of 1865, but was held to be only retrospective. At last a general act to this effect was passed in 1887.³⁵

As a general rule, the record must be transcribed from the origi-

³³ *Musgrove v. Bonser*, 5 Or. 313 (official character of foreign officer not certified); *Evans v. Etheridge*, 99 N. C. 43, 5 S. E. 386 (where the clerk of the superior court had not made the order of probate, but the commissioner of deeds taking the acknowledgment undertook to do so); *Lund v. Rice*, 9 Minn. 230 (*Gil.* 215) (record made from copy of deed); *Davis v. Beazley*, 75 Va. 491 (acknowledgment taken by grantee as certifying officer); *Blood v. Blood*, 23 *Pick.* 80 (unacknowledged deed); *Sumner v. Rhodes*, 14 Conn. 135 (deed defectively executed); *Carter v. Champion*, 8 Conn. 549 (same; and defect not appearing on its face). Not properly proved or acknowledged or certified; *Johns v. Reardon*, 5 Md. 81; *Suiter v. Turner*, 10 Iowa, 517; *Brinton v. Seavers*, 12 Iowa, 389; *Reynolds v. Kingsbury*, 15 Iowa, 238; *Edwards v. Brinker*, 9 Dana (*Ky.*) 69; *Pyle v. Maulding*, 7 J. J. Marsh. (*Ky.*) 202 (proof by only one witness); *Herndon v. Kimball*, 7 Ga. 432; *Johnston v. Slater*, 11 Grat. 321; *James v. Morey*, 2 Cow. 246; *Tillman v. Coward*, 12 *Smedes & M.* (*Miss.*) 262; *Walker v. Gilbert*, 1 *Freem. Ch.* (*Miss.*) 85; *Simpson v. Montgomery*, 25 Ark. 365 (where the certifying officer had misstated his official character); *Westerman v. Foster*, 57 Ind. 408. See, also, 4 Kent, Comm. 174, and cases there quoted; *Heister v. Fortner*, 2 Bin. 40; *Hodgson v. Butts*, 3 Cranch, 140 (a Louisiana case there quoted to the contrary is not an authority in a common-law state). In Tennessee every deed made by the grantor (including married women) in person is presumed, after 20 years, to have been recorded on lawful proof. *Murdock v. Leath*, 10 *Heisk.* (*Tenn.*) 166. But see case first above quoted in section on "Notice."

³⁴ *Illinois*, Rev. St. c. 30, § 31; *Reed v. Kemp*, 16 Ill. 445; *Gillespie v. Reed*, Fed. Cas. No. 5,436; *Ross v. Hole*, 27 Ill. 104; *Moore v. Hunter*, 1 *Gilman*, 331; *Manly v. Pettee*, 38 Ill. 130.

³⁵ See *Allen v. Moss*, 27 Mo. 354; *Hoskinson v. Adkins*, 77 Mo. 537; *Bishop v. Schneider*, 46 Mo. 472; *Gatewood v. Hart*, 58 Mo. 261; Acts 1847, p. 103. Under the Kansas registry act of 1859, in *Simpson v. Mundee*, 3 Kan. 172;

nal deed, and not from a copy of the deed, though such copy may be acknowledged and certified as correct by the grantor himself.³⁶ But in Texas the custom of recording a testimonio drawn up under the Mexican law, which is not an executed deed in the English sense of the word, but a mere minute of proceedings before a notary or like official, has ripened into law; and in many states the law allows the use of copies in certain cases. To the most important of these—that of land lying in different counties—we shall refer in another section.

Leases for less than one year, or assignments of leases having a shorter time than one year to run, are not subject to the registry laws. But instruments creating a term of more than one year must be recorded in Vermont, Rhode Island, Connecticut, Texas, California, the Dakotas, Idaho, Mississippi, and Arizona; of two years or over in New Jersey; of three years in New York, Ohio, Indiana, Michigan, Wisconsin, Minnesota, North Carolina, and Tennessee; of five years in Virginia, West Virginia, and Kentucky; of seven years in Maine, Massachusetts, New Hampshire, and Maryland; leases having over twenty-one years to run, and all deeds not accompanied by immediate possession (in other words, terms to begin in futuro), without regard to length or duration, in Pennsylvania and in Delaware.³⁷ The statutes in other states do not mention leases,—e. g. that of Arkansas, which says: "No deed for the conveyance of real estate, or by which the title thereto may be affected." Now, undoubtedly, even the shortest lease affects the title, and would fall within such a definition. However, but little, if any, trouble has been caused in the solution of this question, as lessees are generally in possession, and that is in most states (as will be seen hereafter) an equivalent for registry.³⁸

Brown v. Simpson, 4 Kan. 76,—recording without acknowledgment was held notice to purchasers. Secus, since act of 1868, see Sanford v. Weeks, 38 Kan. 324, 16 Pac. 465.

³⁶ Stevens v. Brown, 3 Vt. 420; Blight v. Banks, 6 T. B. Mon. 192; Wilson v. Corbier, 13 Cal. 166 (copy from alcalde's book).

³⁷ McPhaul v. Lapsley, 20 Wall. 264.

³⁸ In most of the statutes leases are named in the same section with other conveyances. For separate clauses, see New York, Rev. St. pt. 2, c. 3, §§ 36, 38; California, Civ. Code, § 1214; Delaware, vol. 16, c. 520, § 2; New Jersey, "Mortgages," §§ 21, 22; "Conveyances," § 19.

A deed recorded without proper acknowledgment or proof cannot override a prior unrecorded deed, where the law extends that privilege only to the deed first recorded.³⁹ But, aside of the registry laws, a conveyance by the owner of the legal title, made for value, and professing to pass it to the purchaser, whether put on record or not (hence, also, if improperly put to record), will override an equitable charge or transfer of which the purchaser has no notice, actual or constructive; and this rule of equity is not abridged or repealed by the registry laws.⁴⁰

The laws in most of the states provide also for the recording of plats and subdivisions, for the double purpose: First, of enabling

³⁹ Some authorities on faulty acknowledgment have been given in the chapter on "Title by Grant," under the head of "Other Requisites," where the certificate of acknowledgment is made by the law an element of a valid deed; and under the head of "Privy Examination," where an acknowledgment, and a certificate thereof, is indispensable for passing the estate or rights of a married woman. We may here add a few other illustrations. A deed in North Carolina is not well recorded where the clerk of the superior court, who awards the probate, is himself the grantee, *Turner v. Connelly*, 105 N. C. 72, 11 S. E. 179; nor when it is certified by a justice of a county other than where the acknowledgment is taken, *Duke v. Markham*, 105 N. C. 131, 10 S. E. 1017; but the presumption is that the justice acted in his own county, *Williams v. Kerr*, 113 N. C. 306, 18 S. E. 501. In Maryland the recording was held void because a justice from another county was not certified to by the county clerk. *Sitler v. McComas*, 66 Md. 185, 6 Atl. 527. In Pennsylvania the presumption is that the justice takes the acknowledgment within his county. *Ross's Appeal*, 106 Pa. St. 82. In Nebraska the certificate is bad unless it shows that the grantor executed the deed voluntarily. *Keeling v. Hoyt*, 31 Neb. 453, 48 N. W. 66, quoting two older cases in same state. And the words, "subscribed and acknowledged before me," with date and official signature, were held insufficient in *Myers v. Boyd*, 96 Pa. St. 427. In Florida the proof by witness of signature, saying nothing of delivery, is insufficient. *Edwards v. Thom*, 25 Fla. 222, 5 South. 707. The certificate is not vitiated because signed by a notary, who acted as attorney for both, and afterwards for one party. *Wardlaw v. Mayer*, 77 Ga. 620. Certificate by county judge of another state is not recordable in Georgia unless it is certified to by clerk of court. *MacKenzie v. Jackson*, 82 Ga. 80, 8 S. E. 77. Thus the entry of an unacknowledged assignment of mortgage is no notice. *Fisher v. Cowles*, 41 Kan. 418, 21 Pac. 228. In Georgia a home notary's certificate need not bear

⁴⁰ This matter is fully illustrated in the notes to *Basset v. Nosworthy*, 2 White & T. Lead. Cas. Eq. 1.

the grantor and others in subsequent deeds to refer in their deeds to the blocks and lots of the plat as matters of public record; secondly, of dedicating to the public the streets, wharves, alleys, and open places laid down on the plat.⁴¹

Some of the statutes in the Southern states insist on the recording of "marriage settlements," and of "deeds of gift." These provisions were intended mainly to notify the husband's creditors that slaves in his apparent possession were claimed by the wife as separate estate, under his permission, or her father's gift, and are of no importance at this time; nor have they ever had much bearing on the title to land.⁴²

A few statutes make provisions for putting on record, to preserve as *prima facie* proof, the evidence that a deed by a fiduciary has been executed after a sale conducted according to law, namely, a copy of the advertisement for the public and sale and an affidavit showing the publication are to be recorded along with the conveyance.⁴³

A remarkable exception has been lately ingrafted on the rule, which renders the registry of the deed void if it was not lawfully acknowledged. A deed had been certified by a notary as having been acknowledged before him in his county, and had been recorded on this certificate. The proof showed that he had really met the grantor a short distance outside of the county line, where he had no jurisdiction; but it was held that the grantor and all claiming under him were estopped from setting up this hidden defect, and the

his seal. *Lamar v. Coleman*, 88 Ga. 417, 14 S. E. 608. A recent Michigan act (May 27, 1893, Sess. Acts, p. 224), amending section 5660 of the statutes, gives still further aid to acknowledgments taken out of the state, so as to make them recordable.

⁴¹ See *Satchell v. Doram*, 4 Ohio St. 542, and, for statutory provisions, among others, Wisconsin, §§ 2262, 2263. In that state the marking of a public square in a town plat vests the fee in the town, *Williams v. Smith*, 22 Wis. 598; while an informal plat is no more than a parol dedication, *Fleischfresser v. Schmidt*, 41 Wis. 223. A map recorded in pencil is said not to be within the spirit of the recording law. *Caldwell v. Center*, 30 Cal. 539. See, also, *Maywood Co. v. Village of Maywood*, 118 Ill. 65, 6 N. E. 866, on dedication of a park.

⁴² Kentucky, St. 1894, § 494, traced back to an old Virginia recording act; Texas, arts. 4335, 4336; North Carolina, Code, § 1268; similar in West Virginia, Arkansas, California. See, also, *Boston v. Cummins*, 16 Ga. 102.

⁴³ E. g. Rhode Island, St. c. 173, § 11.

acknowledgment and registry thereon were sustained, the purchaser having had no knowledge of the irregularity.⁴⁴

The recording of powers of attorney, and the entering of assignments and releases of mortgages, is in most states regulated by special laws, of which we must treat hereafter.

§ 128. Place of Recording.

We have shown that the town is the unit of area under the registry laws of Vermont, Connecticut, and Rhode Island; the county (varied in Virginia by the city or borough with county powers) in all the other states and territories. Under the older statutes of some of the states, especially of Virginia and Kentucky, a very unwise law prevailed formerly, of allowing deeds to be lodged for record at some central point for the whole state, such as the clerk's office of the court of appeals; but these records have long ago been closed, and most of the contents transcribed into the deed books of the counties in which the land has its situs.⁴⁵ But another difficulty remains. A tract of land may stretch through two or more counties, or a grantor may in the same deed convey several tracts lying in two or more counties. A strict regard for the principles of a sound registry law would require that the registration in any one of the counties (or towns, if in the three states first named) should be notice to purchasers or creditors only as to the land situate in that county or town; and the practical reasons for such a rule are even stronger when several tracts of land, not touching each other, and lying in several counties or towns, are embraced in the same deed. Where the language of the recording statute simply says that a deed shall be void as against purchasers unless it be lodged for record with the recording officer of the county or town in which the land lies, or words to that effect, this result would naturally follow. So it is, with a slight modification, in Vermont, Connecticut,

⁴⁴ Mutual Life Ins. Co. v. Corey, 135 N. Y. 326, 31 N. E. 1095.

⁴⁵ Virginia act of 1785 (in force in 1787) allows recording in the "general court"; for the district of Kentucky in the district court. Early Kentucky acts allowed recording in the clerk's office of the court of appeals or general court. It was intended as a convenience to nonresident owners, and to those proposing to buy for them. The Kentucky Revised Statutes of 1852 made an end of it.

and Rhode Island; ⁴⁶ and so, as to counties, in Maine, Massachusetts, New York, Maryland, Indiana, Minnesota, California, Virginia, West Virginia, Alabama, and Mississippi. Some of the statutes say expressly that where the tract lies in several counties the deed must be recorded in each.⁴⁷ In Delaware and Nebraska, a deed is to be recorded in the county in which the land conveyed or affected thereby, or any part of such land, lies; which seems to include as well one of several tracts, as parts of a contiguous tract.⁴⁸ Still more uncertainty is introduced where the law requires the deed to be recorded in the county in which "the property conveyed, or the greater part," lies. Such is the statute in Kentucky.⁴⁹

A middle course is pursued in Tennessee. There, when a deed affects a tract running through two or more counties, it may be recorded in either of them. But if it affects several tracts, which lie each in another county, it must be recorded in each of them; though it is not likely that under the general words of a statute allowing a deed to be recorded in a county in which the land, or any part

⁴⁶ Under Revised Laws of Vermont (section 1929) land lying in unorganized towns may be recorded with the county clerk. By section 1930 deeds may be recorded with him in addition to the record with the town clerk, to serve if the latter record happen to be destroyed. Section 1927 directs that the deed be "recorded at length in the clerk's office of the town in which such lands lie." Connecticut, Gen. St. § 2961, "records of the town where the lands lie"; Rhode Island, c. 173, "town where the lands, etc., lie." A Michigan act of 1889 (Pub. Acts, No. 258) allows records to be transcribed from county to county. Similar provisions are found in the statutes of most Northwestern states.

⁴⁷ Maine and Massachusetts (see former chapter 73, § 26) expressly provide for recording same deed in several counties (two counties of Maine are divided into registry districts); Indiana, Rev. St. § 2952, "county in which the land * * * is situate"; Minnesota, c. 40, § 21, substantially the same; South Carolina, § 1776, "county where the property is situate"; Virginia, Code, § 2466, and corresponding clause in West Virginia Code; Alabama, Civ. Code, § 1796; Mississippi, St. § 2457, clerk of proper county; California, Civ. Code, § 1169; Maryland, art. 21, § 13, "to be recorded in all counties"; Oregon, Code, § 3023. And see *Harper v. Tapley*, 35 Miss. 506. Mississippi, § 2477, allows any county to be divided into two registry districts.

⁴⁸ Delaware, c. 83, § 14, "county wherein such lands * * * or any part thereof"; Nebraska, § 4342, "such real estate or any part."

⁴⁹ Kentucky, Gen. St. c. 24, § 9 (1894, § 495). And see *Conn. v. Menifee*, 2 A. K. Marsh, 396, under the recording act of 1798.

thereof, lies, some of the state courts would not permit the abuse, so readily leading to fraud, of including unconnected tracts, lying in different counties, in one deed.⁵⁰ Some of the states have statutory provisions for making the record in one county from the transcript of the deed already made in another, either in all cases, or, at least, when the original is lost or destroyed.⁵¹ In some of the far western states, like Texas and Kansas, there have been and still are "unorganized counties," which have not their complement of officials, or of places for public business. Acts attaching such a county to one fully organized for "judicial purposes" have been generally construed to embrace the registry of deeds as one of these purposes.⁵²

An early Pennsylvania decision at nisi prius admits the record of a deed conveying land in two counties, and recorded in one only, as evidence in a suit over the land in another county. This is acknowledged to be the law of Pennsylvania in a later well-considered case before the supreme court; but whether this is to be carried so far (as seems to be thought by the editors of the *Leading Cases in Equity*) that the record in one county would be notice as to a tract lying in another county, and included in the same deed, is very doubtful.⁵³

⁵⁰ Tennessee, Code, § 2843. It was, however, held in Virginia, under a former statute declaring a registry in a county in which part of the land lies to be sufficient, that it does not apply to one of several tracts included in one deed, and that, where parts of the land lie on the two sides of a river which divides two counties, they are separate tracts. *Horsley v. Garth*, 2 Grat. 471.

⁵¹ E. g. New Hampshire, c. 135, § 5; New Jersey, Supp. Revision, "Conveyances"; Pennsylvania, Purd. Dig. "Deeds," 73; Ohio, § 1149; Illinois, c. 30, § 29; Wisconsin, § 2233; Minnesota, c. 40, § 33. When lost, Maine, c. 73, § 26; Michigan, §§ 5716, 5717, etc.

⁵² *Baker v. Beck*, 74 Tex. 562, 12 S. W. 229; *Reeves Co. v. Pecos Co.*, 69 Tex. 177, 7 S. W. 54.—decide that territory detached from old county is within it as a registry district till organized; *Harris v. Monroe Cattle Co.*, 84 Tex. 674, 19 S. W. 869.—that recording in a county to which territory is attached for judicial purposes only is insufficient. Financial and judicial purpose is enough to take in recording. *Meagher v. Drury* (Iowa) 56 N. W. 531.

⁵³ *Scott v. Leather*, 3 Yeates, 184; *Kerns v. Swope*, 2 Watts, 75. (See "Deeds and Mortgages," § 48, sub fine.) See distinction in *Vickroy v. McKnight*, 4 Bin. 212, between not recording and badly recording in proper county.

Where a county is divided, one of the parts generally retains the county seat and the old name; and the law establishing the new county then provides for transcribing in record books, to be kept in the newly-named county, all conveyances affecting land lying within it. But whether this is so directed or not, and whether it is done or not, the grantees in conveyances theretofore recorded are not bound to have these conveyances recorded afresh at their own expense; but the record once made remains notice to purchasers and creditors.⁵⁴ Where, however, after the date and execution of the deed, but before it is put to record, a new county, embracing the land conveyed, is carved out of that in which the land lay when the deed was written, it must be recorded in the new county.⁵⁵

§ 129. Time of Recording.

In a commercial community, in which the most valuable part of landed property consists in town lots and business houses, an absolute security against all outstanding secret claims or interests is demanded; for purchases or advances are made in the great majority of cases on the security of the abstract alone, without any personal knowledge about the grantor's character, or about the ownership of the land. Hence nearly all of the present statutes give no particular time for the recording of a deed, but simply direct that it shall take effect against subsequent purchasers without notice only from the time when it is "recorded" or when it is "lodged for record."⁵⁶ And, while some of the states have not yet introduced this plain rule as to the registry of absolute deeds, it is practically universal as to mortgages, with which many statutes couple "deeds of trust," which means either mortgages to a person other than the creditor, vesting in such person a power of sale on default, or a deed to an assignee on trust, for the benefit of the grantor's creditors.⁵⁷

⁵⁴ Garrison v. Haydon, 1 J. J. Marsh. (Ky.) 222. Nor upon change of county lines, throwing land into a new county. Koerper v. St. Paul & N. P. Ry. Co., 40 Minn. 132, 41 N. W. 656.

⁵⁵ Astor v. Wells, 4 Wheat. 466; Garrison v. Haydon, 1 J. J. Marsh. (Ky.) 222.

⁵⁶ E. g. New York, Rev. St. pt. 2, c. 1, tit. 2, § 144.

⁵⁷ E. g. Kentucky, Acts 1891-93, c. 186, § 7 (St. 1894, § 496).

The older recording laws made for agricultural communities were much less trenchant. They allowed a long time, ranging from six months to two years, between the execution of a deed and its recording or lodging for record. If this was done within the time limited, the deed would, by relation, take effect from its delivery. If the recording was delayed, it might fail of its effect altogether, or at best the deed would take effect against subsequent purchasers only from the time at which it was put to record.⁵⁸ It is of little importance to discuss the older statutes on the subject, except Ohio and Alabama. In the former the allowance of six months for absolute deeds was only abolished on the 1st of July, 1885; in Alabama the delay of three months was repealed by omission from the Code as revised in 1886.⁵⁹

Of those now in force the following do still give a certain named time for recording: As to conveyances: In Georgia, within 1 year from the time of execution; in Pennsylvania, within 6 months, or 12 if executed out of the state, except in the city of Philadelphia, where, under an act which came into force July 1, 1878, conveyances take effect against purchasers only from the time when they are lodged for record; in Indiana, 45 days; in South Carolina, 40 days; in New Jersey, 15 days; in Oregon, in 5 days; in Delaware, if the deed be lodged for record on the day of execution, the effect goes back to the moment of delivery.⁶⁰ But among these states New Jersey and Penn-

⁵⁸ Till Act 1885, c. 147, § 1, North Carolina had practically no law compelling the registration of absolute deeds, as the statutory time was two years, and this was extended by each legislature (except 1820–1823) until that time. See now section 1279 of North Carolina, Code, and *McCall v. Wilson*, 101 N. C. 598, 8 S. E. 225. Virginia, Acts of 1748 and 1785. Kentucky, Rev. St. 1852, gave as to absolute deeds made in the state 8 months; out of state, in United States, 12 months; out of United States, 18 months. Alabama, till the adoption of the late Code, allowed three months. Delaware, until change made by Act, volume 17, c. 213, gave a year (but a mortgage had precedence only from date of recording). See for the regular acts extending time in North Carolina, *Hill v. Jackson*, 9 Ired. 336.

⁵⁹ Ohio, Rev. St. § 4134, in the Revision before 1890; Alabama, Civ. Code, before 1886, § 2168. See on the latter, *Betz v. Mullin*, 62 Ala. 365.

⁶⁰ Georgia, Code, § 2705; Pennsylvania, Dig. "Deeds and Mortgages," 76; as to Philadelphia, Id. 103; Ohio, Rev. St. 4134; Indiana, Rev. St. § 2931; South Carolina, § 1776; New Jersey, "Conveyances," 14. The confusion arising from the Acts of 1799, 1801, and 1820, whereby a deed not lodged for

sylvania expressly enact that mortgages or "mortgages and deeds of trust" are to take effect as against subsequent purchasers or creditors only from the time when they are put to record.⁶¹ An exception is made as to mortgages for the purchase money by the law of Pennsylvania, which allows a delay of 60 days for recording them. Delaware allows 30 days.⁶² Again, Pennsylvania allows 60 days in which the defeasance which turns an absolute deed into a mortgage may be recorded; Delaware and Indiana, 90 days; and in Delaware, if several mortgages on the same land are recorded at the same time, they take priority by dates.⁶³ In Maryland, if a conveyance is put to record within six months of its execution, it takes effect by relation back, as against existing creditors; otherwise only from the time it is put on record.⁶⁴ In Kentucky the distinction formerly so general as to deeds made outside of the state still prevailed until the new act going into force October 9, 1893. If executed within the United States, outside of Kentucky, deeds were good for four months; if outside of the United States, for one year; if within the state, only sixty days,—all of which is swept away.⁶⁵ In Delaware a deed cannot be lawfully recorded at all unless it be lodged for record within one year; in North Carolina not after a lapse of two years.⁶⁶ We have elsewhere spoken of the former Kentucky law which avoid-

record within 15 days became thereafter unrecordable, was laid bare in *Sanborn v. Adair*, 29 N. J. Eq. 338, and was then cured by statute. See Supplement, "Conveyances," 9, 10. Oregon, St. § 3027; Delaware, volume 17, c. 213, § 4. In Georgia the actual copy must be made within the time limited. Lodging within it is not enough. *Benson v. Green*, 80 Ga. 230, 4 S. E. 851.

⁶¹ Pennsylvania, Dig. "Deeds and Mortgages," 103; Ohio, Rev. St. 4133 (most stringent and most stringently enforced); New Jersey, "Mortgages," 22; Kentucky, *supra*, § 10; Delaware, Rev. Laws, c. 83, § 19.

⁶² But a mortgage recorded after 60 days is good against deeds of older date recorded later. *Fries v. Null*, 154 Pa. St. 573, 26 Atl. 554; *Safe-Deposit & Trust Co. v. Kelly*, 159 Pa. St. 82, 28 Atl. 221; Delaware, Rev. Laws, c. 83, § 21; and volume 17, c. 213, § 1.

⁶³ Pennsylvania, Dig. "Deeds and Mortgages" (chapter 91 of 1881); Indiana, Rev. St. § 2932; Delaware, Rev. Laws, c. 83, § 20.

⁶⁴ Maryland, Gen. Pub. St. art. 21, §§ 13, 19. See *Sixth Ward Bldg. Ass'n No. 5 v. Willson*, 41 Md. 506.

⁶⁵ Kentucky, Gen. St. c. 24, §§ 14, 16, 17; contra, Acts 1893, c. 186, § 7 (St. 1894, § 496).

⁶⁶ Delaware, Rev. Laws, c. 83, § 14; North Carolina, Code, §§ 1252, 1254.

ed the deeds of married women not recorded within the prescribed time.

These statutes cause some difficulty and uncertainty as to the day from which the length of time is to be counted,—whether from the date of the deed, or from the delivery, or from the acknowledgment; and as to the effect of a recording after the prescribed time the words of the statute and the construction differ greatly in the various states. The simplest position was that plainly expressed in the Kentucky act,—that a deed recorded within time related back to its delivery, while one recorded after such time gained priority only from the time at which it was lodged for record.⁶⁷ In Georgia, however (and formerly in New Jersey), the belated deed loses much of its effect as a conveyance. It has no longer the force of overriding an older unrecorded deed.⁶⁸ In Georgia, deeds not recorded within the year are treated very much like unrecorded; hence, between two recorded after the lapse of a year, that which is first delivered, not the one first put to record, prevails.⁶⁹

As to the day to count from: In the absence of all proof to the contrary, a deed is supposed to be executed and delivered on the day of its date; but a deed is valid without any date. A deed is sometimes antedated, and very often the execution is delayed after the instrument is fully prepared, and the delivery again may follow the execution after a long interval. It was held in an early case, which seems not to have been overruled or shaken, that, unless the certificate of proof by witnesses indicates a different day of execution or delivery than the date, the latter must stand as the starting point for the statutory time.⁷⁰ But it might be different where the deed was acknowledged, for the act of acknowledging, indicating that the deed is still in the grantor's possession, generally either falls in with or precedes that of delivery.⁷¹

⁶⁷ *Supra*, note 65.

⁶⁸ *Turner v. Tyson*, 49 Ga. 475; *Martin v. Williams*, 27 Ga. 406.

⁶⁹ *Hand v. McKinney*, 25 Ga. 648.

⁷⁰ *Harvey v. Alexander*, 1 Rand. (Va.) 219, no longer applicable in Virginia.

⁷¹ A dictum in *Simpson v. Loving*, 3 Bush, 458, says that a grantor, by antedating his deed by eight months before he acknowledged it, rendered it incapable of being recorded "in time" so as to relate back when recorded to the time of delivery.

The exact time when a deed is lodged for record, or when it otherwise becomes effective against subsequent purchasers, must, in most cases, be marked upon it by the recording officer; but, in the absence of his official indorsement or memorandum on his index, the exact time may be proved by parol.⁷²

An Alabama act, passed only a year after the Revision of 1886, deals with the whole subject. All conveyances of unconditional estates (i. e. ordinary deeds) and mortgages of real estate for securing debts are to be void against purchasers for valuable consideration, mortgagees, and judgment creditors without notice, unless recorded within 30 days after date.⁷³

§ 130. Mortgages, Assignments, and Releases.

The laws as to the recording of mortgages, as we have seen, are much stricter than those dealing with absolute deeds. Less time, or no time, is allowed for putting them on record; and in Ohio a mortgage does not take effect against third parties (even volunteers or those having notice) except from the time when it is recorded.⁷⁴

⁷² Metts v. Bright, 4 Dev. & B. 173; Saunders v. Ferrill, 1 Ired. 97; Green v. Kornegay, 4 Jones (N. C.) 66.

⁷³ Alabama, Sess. Acts 1887, No. 100, amending section 2166 of the Civil Code.

⁷⁴ Actual notice no substitute. Bloom v. Noggle, 4 Ohio St. 45, following Stansell v. Roberts, 13 Ohio, 148. The act of 1838 settled all doubts as to priority. Magee v. Beatty, 8 Ohio, 396; Mayham v. Coombs, 14 Ohio, 428 (notice immaterial when the mortgage is improperly recorded). Unrecorded mortgage void as against judgment lien, White v. Denman, 1 Ohio St. 110; or against execution, Fosdick v. Barr, 3 Ohio St. 471. Recorded, but not recordable, because not under seal, void against subsequent assignment for creditors. Erwin v. Shuey, 8 Ohio St. 509. Even the recognition of a prior unrecorded mortgage by excepting it from the warranty does not give it priority (secus, if reserved in granting or habendum clause). Bercaw v. Cockrell, 20 Ohio St. 163. It is good between the parties, though unrecorded. Fosdick v. Barr, 3 Ohio St. 475. And see Bloom v. Noggle, *supra*; Sidle v. Maxwell, 4 Ohio St. 236; Hanes v. Tiffany, 25 Ohio St. 549. May be recorded after grantor's death. Gill v. Pinney's Adm'r, 12 Ohio St. 38. Delay in recording may be proof of fraud, but otherwise leaves the mortgage good against creditors from time it is lodged. Stewart v. Hopkins, 30 Ohio St. 502. Deed made by husband to trustee, with lease back to him to secure wife's

The registry acts of many states name "deeds of trust" along with mortgages. This always means deeds made for the securing or paying of debts, not deeds of trust for the benefit of wife or kindred. When a deed, absolute in form, is accompanied by a separate defeasance, the latter, being, as we have seen, a recordable instrument, ought also to be recorded. The omission to do so, or even the recording a deed absolute in form, but meant only as a security for money, in the deed book, instead of the mortgage book, is deemed a fraud in New York, New Jersey, Delaware, Maryland, Nebraska, and by one provision in the Dakotas; and the fraud is punished by denying to the record thus made all the effect of the registry laws as against prior or subsequent grantees;⁷⁶ while in the states of Massachusetts, Maine, Pennsylvania, Indiana, Michigan, Wisconsin, Minnesota, Kansas, Alabama, California, Oregon, Wyoming, and under another provision of the Dakota Code, the effect of the omission to record the defeasance is to allow one who purchases for value and in good faith from the grantee to obtain an indefeasible title. And this must also be the result in the first-named and other states; but none but a purchaser for value, or one occupying an equally good position, could claim a title superior to the defeasance.⁷⁷ In Pennsylvania, mortgages of leaseholds are subjected to special forms. The record of the mortgage is not notice unless the lease itself is recorded, and unless the former refers to the book and page of the latter.⁷⁸

alimony, though intended as mortgage in favor of the latter, stranger purchasing fee and leasehold not affected with notice. *Forsha v. Longworth*, 22 Wkly. Cin. Law Bul. 354, affirming same case, 1 Ohio Cir. Ct. R. 271. In *Kemper v. Campbell*, 44 Ohio St. 210, 6 N. E. 566, the court refused to carry the rule to an extreme in favor of a deed of general assignment; an absolute deed, meant for a mortgage, having been delivered before, but left for record shortly after it.

⁷⁶ See statutes on recording defeasance, § 127, note 30 (when the defeasance is surrendered by quitclaim, the title becomes absolute, and the registry good. *Hockenhull v. Oliver*, 80 Ga. 89, 4 S. E. 323). In Maryland, when the deed is thus improperly recorded, the record is not proof, *Water's Lessee v. Riggan*, 19 Md. 536; though it is binding between the parties, *Owens v. Miller*, 29 Md. 144. An agreement to reconvey, not making a mortgage, does not avoid the registry in the deed book in New York. *Macauley v. Porter*, 71 N. Y. 173.

⁷⁷ *Columbia Bank v. Jacobs*, 10 Mich. 349.

⁷⁸ *Hilton's Appeal*, 116 Pa. St. 351, 9 Atl. 342.

We have seen that the assignment of a mortgage is a conveyance within the meaning of most, if not of all, the recording laws. Some of them expressly declare the assignee to be a purchaser. A few of the states provide for entering short transfers on the book in which the mortgage is transcribed, either in the margin or in a blank space left for the purpose.⁷⁹ But the transfer of a note or bond secured by mortgage, in law, or at least in equity, carries with it the security. These notes and bonds are transferred, bought, or discounted like commercial paper; and those who take them seldom go to the trouble of obtaining a formal assignment, or of spreading it on the record.⁸⁰ No part of the recording law is more imperfect than that relating to the assignment and to the "release of record" or satisfaction of mortgages and liens. The simple rule would be, in the absence of a recorded transfer, to consider the original mortgagee or lienholder as still owning the security, and to protect every one who buys on that presumption as a purchaser in good faith. Hence, if the mortgagor conveys to the mortgagee, there is an ap-

⁷⁹ The recording officer writes out the assignment, and attests the signature on the margin. Indiana, Rev. St. § 1098; Kentucky, Act 1876, c. 850 (not, it seems, repealed by the recording act of 1893). Similar in Wyoming. In Maryland, art. 21, § 32, a short form is given for an assignment to be written out in blank in the book under the mortgage. In Pennsylvania (Purd. Dig. "Deeds," 123), the assignment is transcribed in a separate book, but a reference to it is marked on the margin of the mortgage record. In Wisconsin (St. § 2210), an assignment written on the back of mortgage may be recorded without acknowledgment. In Florida (section 1391), there is a book for these assignments, but they are also noted in the margin. In Pennsylvania, where the entry of satisfaction is made by the recorder, at the mortgagee's request, it is not conclusive, like a judgment; and, even when the request was made, mistake may be shown, except against purchasers for value. West's Appeal, 88 Pa. St. 341. Mistake in satisfaction corrected by decree. Bond v. Dorsey, 65 Md. 310, 4 Atl. 279.

⁸⁰ California (Civ. Code, § 2936), the Dakotas, Montana, and Idaho have written out in the statute the principle that a transfer of the note carries the mortgage. In New Jersey ("Mortgages," 31) and Florida (section 1985) the assignee is authorized to sue in his own name. Quære, would the assignee of a mortgage, not having his assignment recorded, be compellable in other states to make original mortgagee party to a suit for foreclosure and sale, so as to give a clear title? Maryland acts of February 11, 1890, and April 3, 1890, make it the duty of the recorder to note on the margin of the record of a mortgage any transfer or release which is effected by a separate deed.

parent merger of the whole estate in him, justifying a stranger to buy from him the land, or to take it in security of a loan. But the courts, it seems, have all taken the opposite view, viz. that a merger arises only from the intent of the parties, and cannot be inferred from the deeds alone, and that one who sees the mortgage on record must look for the owner and holder of the bond or note which it secures.⁸¹ The only meaning of the law requiring the assignment of a mortgage to be recorded is to make it notice against those claiming the mortgage itself by subsequent transfer from the same assignor; but it is not notice to those claiming under the mortgagor. And so the law is plainly expressed in some of the far western states, i. e. in the Field Code.⁸²

Provision is made in very many of the states for entering a dis-

⁸¹ In *Purdy v. Huntington*, 42 N. Y. 334, and *Sprague v. Rockwell*, 51 Vt. 401, there seemed on the record to be a merger of mortgagor's and mortgagee's estate (which last relies on *Pratt v. Bank of Bennington*, 10 Vt. 293); yet an unrecorded assignment, made before the merger, was preferred to purchaser of this unified estate. In *Holliger v. Bates*, 43 Ohio St. 437, 2 N. E. 841, assignee of mortgage note, without even a written assignment, was allowed to redeem after foreclosure sale against a senior mortgagee appearing such on record. In *Oregon & W. Trust Inv. Co. v. Shaw*, 5 Sawy. 336, Fed. Cas. No. 10,556, it was held outright that a purchaser has no right to rely upon the merger arising from a conveyance between mortgagor and mortgagee. "Mergers were never favored in courts of law, and still less in courts of equity," Co. Litt. 338b; *Philips v. Philips*, 1 P. Wms. 41; and with a view to a mortgagee buying the equity of redemption, *James v. Morey*, 2 Cow. 246, 284.

⁸² *Decker v. Boice*, 83 N. Y. 215, goes somewhat further, and is hard to reconcile; *Westbrook v. Gleason*, 79 N. Y. 23. See, also, *Viele v. Judson*, 82 N. Y. 32. *Jackson v. Van Valkenburgh*, 8 Cow. 260, is overruled. The statute in New York, Michigan, Wisconsin, Minnesota, etc., provides that the recording of the assignment is not notice to the mortgagor, so as to make void his payment to the original mortgagee. See, e. g., Wisconsin, St. § 2244; *Pickett v. Barron*, 29 Barb. 505; *Greene v. Warnick*, 64 N. Y. 220. In *Smyth v. Knickerbocker Life Ins. Co.*, 84 N. Y. 589, a release of part of the land by the mortgagee was held void because made after an assignment had been put on record. See note 80 as to Western states. It was held in *O'Mulcahy v. Holley*, 28 Minn. 31, 8 N. W. 906, that one who buys a mortgage securing a note from the mortgagee, who is not in possession of the note, is not a bona fide purchaser within the registry laws. And in Michigan, where the statute (section 5687) declares that the record of an assignment is not notice to the mortgagor, the latter may pay a negotiable note wherever he finds it. *Williams v. Keyes*, 90 Mich. 290, 51 N. W. 520.

charge, satisfaction, or release on the book of mortgages by entry on the margin.⁸³ If this is done, or when the mortgage has, in the absence of a statute to that effect, put a deed of release on record, the better opinion is that a purchaser is protected against an assignee who has not recorded his assignment. The mortgage being released in the usual way, there is no reason why a purchaser should suspect any wrong. An inquiry after the holder of the mortgage note would in many cases (especially if undertaken by a remote purchaser) be wholly aimless and futile.⁸⁴ In the two states of New Jersey and Indiana the wise and consistent course has been struck out by statute. The assignee who does not have his assignment registered may be disregarded by those dealing with the land, as well as those

⁸³ Massachusetts, c. 120, § 24; Vermont, § 1950; Rhode Island, c. 176, § 6; Connecticut, § 79 (duty of town clerk); Pennsylvania, "Deeds," etc., 115; Ohio, §§ 4135, 4136; Indiana, § 1090; Illinois, c. 95, § 8; Michigan, § 5701; Wisconsin, § 2247; Iowa, § 3327 (the mortgagee or those legally acting for him); Minnesota, c. 40, § 36; Kansas, pars. 3889-3891; Nebraska, § 4350; Delaware, c. 83, § 22; Maryland, art. 21, § 34; Virginia, Code, § 2498; West Virginia, c. 76 (which covers different kinds of liens); North Carolina, § 1271; South Carolina, § 1791; Florida, § 1391; Kentucky, 1893, c. 186, § 9 (St. 1894, § 498); Tennessee, § 2837, subd 9; Id. § 2839; Alabama, Civ. Code, § 1868 (partial), § 1869 (full release); Mississippi, § 2451; Missouri, § 7094; Arkansas, § 4745; California, Civ. Code, § 2938; Dakota Territory, Civ. Code, § 1735; Colorado, § 234; Nevada, §§ 2604-2606; Idaho, § 3361; Montana, Gen. Laws, §§ 271, 272; Oregon, Misc. Laws, p. 1365; also Wyoming, § 30; Utah, § 2641; and Arizona, § 2360. In New York, New Jersey, and a few other states, a deed of release seems still to be the only way to cancel a mortgage of record. In Kentucky, mortgages for the purchase money are almost unknown. In place thereof the seller reserves an express vendor's lien for the unpaid part of the purchase money, stating amount and terms of payment. The release is, under clause quoted above, put opposite the transcript of the deed containing such lien, just as with a mortgage.

⁸⁴ Bacon v. Van Schoonhoven, 87 N. Y. 446. Purdy v. Huntington, 42 N. Y. 334, was urged against the judgment, and is hard to reconcile with it. There is no difference in principle between a merger of the mortgage in the ownership and its satisfaction. But in the case *supra* from 5 Sawy. 336, Fed. Cas. No. 10,556, arising under the Oregon statute, which allows the "mortgagee or his assignee" to enter satisfaction of a mortgage, it was held that such an entry, if made by the mortgagee after a sale of the mortgage, would have been void, and would not have aided the purchaser. The clause for cancellation of mortgages in Florida and in several other states also enables an "assignee" to enter the release.

who deal with the mortgage; and a foreclosure, or decretal sale, to which he has not been made a party, is as binding upon him as upon any unsecured creditor of the mortgagor.⁸⁵ In Kansas, the courts have drawn a distinction between a mortgage given to secure commercial paper which is sold before maturity and all others. One who becomes assignee of the former by purchasing the note is protected, though he does not register his assignment, nor notify the debtor, and will yet enjoy the full ownership of the mortgage.⁸⁶

Where the entry of satisfaction is made by the recording officer, it is not a judicial act; and it may be shown to have been entered by mistake, even against a purchaser without notice. Where the entry is made by the mortgagee, he would, of course, be estopped, as against innocent parties acting upon it, from controverting its truth.⁸⁷ In Arkansas, a late act, following the modern tendency, directs that mortgages shall in all respects be recorded in the same manner and with the same effect as absolute deeds.⁸⁸

§ 131. Powers of Attorney.

The following principles govern the recording of powers of attorney, each of them being subject to exception, under the legislation of one or more states:

First. A power of attorney, authorizing its recipient to execute on behalf of another a deed affecting land, is an instrument fit to be recorded; so that the transcript on the record book is proof of execution, provided it has been properly acknowledged or proved for record.

Second. It ought to be recorded in the county, district, or town in which the land to be affected lies.

⁸⁵ New Jersey, "Mortgages," 32, 35; Indiana, Rev. St. § 1094.

⁸⁶ Burhans v. Hutcheson, 25 Kan. 625; Lewis v. Kirk, 28 Kan. 497. It is said that paragraph 3887, about recording assignments, etc., finds application when the debt secured is not negotiable.

⁸⁷ Brown v. Henry, 106 Pa. St. 262; West's Appeal, 88 Pa. St. 341, note. As to the manner of recording mortgages of leaseholds under the Pennsylvania statute, the reader is referred to Gili v. Weston, 110 Pa. St. 305, 1 Atl. 917.

⁸⁸ Sess. Acts 1891, c. 7.

Third. Unless the power to the attorney who executes a deed affecting real estate is recorded,—and lawfully recorded,—the recording of the deed itself is not effective as notice to purchasers and creditors.

Fourth. The revocation of a letter of attorney may be recorded.

Fifth. Where a power of attorney is recorded, he who, in good faith and relying upon it, purchases land by deed from the person named in such power as the owner's attorney, is protected against any revocation of such power, unless the revocation has also been placed on record.

In most of the states the provision for recording "letters" or powers of attorney is express. Such it is in New Hampshire, Vermont, Massachusetts, Connecticut, New York, New Jersey, Pennsylvania, Indiana, Illinois, Michigan, Wisconsin, Delaware, Maryland, Virginia, West Virginia, North Carolina, Florida, Kentucky, Tennessee, Alabama, Mississippi, Minnesota, Nebraska, Missouri, Arkansas, Colorado, California, Oregon, the Dakotas, Idaho, Montana, Nevada, New Mexico, Arizona; though not in all these states is the statute law alike full and explicit. So in California it speaks only of recording powers of attorney for executing mortgages, and only by implication of those authorizing the execution of absolute deeds.⁸⁹ In other states the recording of powers of attorneys is not provided for in express words. So in Maine, Rhode Island, Ohio, South Carolina, Georgia, Wash-

⁸⁹ New Hampshire, c. 137, § 6; Vermont, § 1905; Massachusetts, c. 120, § 6 (setting aside the law declared in *Valentine v. Piper*, 22 Pick. 85); Connecticut, § 2961 (power to be recorded with deed); New York, Rev. St. pt. 2, c. 3, § 39; New Jersey, "Conveyances," 16, 17, 64; Pennsylvania, "Attorneys in Fact"; Indiana, §§ 2920, 2957 (see *Butterfield v. Beall*, 3 Ind. 203); Illinois, c. 30, § 35 (may be recorded); Michigan, § 5690; Wisconsin, §§ 2237, 2245, 2246; Delaware, Laws, c. 83, § 11; Maryland, art. 21, § 25 (section 26 as to revocation); Virginia, § 2509 (only as to attorney for nonresident married women), § 3344 (foreign power of attorney); West Virginia, c. 73, § 1; North Carolina, Code, § 1249; Florida, § 1972 (very imperative); Kentucky, Acts 1891-93, c. 186, § 10; St. 1894, § 499 (deed under power cannot be recorded, unless the latter is; revocation of recorded letter must be recorded); Tennessee, § 2837, subd. 2; Alabama, Civ. Code, § 1801; Mississippi, § 1913; Minnesota, c. 40, §§ 27-29 (revocation also to be recorded); Id. § 3 (vote of corporation appointing attorney); Nebraska, § 4371; Missouri, §§ 2425, 2426 (also revocation); Arkansas, § 661 (as imperative as Kentucky, supra. See *Jones v. Green*, 41 Ark. 363); Colorado, § 209 (imperative); California, Civ.

ton, and in the two states first named it is probably not necessary that the power of attorney be recorded in order to make the deed executed by the attorney recordable.⁹⁰ Where the rule prevails that a recordable deed can only flow from a recorded power, the latter must be executed and acknowledged with all the forms of a good deed, and must be recorded in the proper county.⁹¹ A power of attorney to convey land may be recorded in any county in which the grantor may at the time or thereafter have land to convey (unless it is restricted to particular tracts); that is, in any county of the state. But it does not follow that, when recorded in one county, it will make a deed as to land in another county recordable; nor will it, at least in some states, and where the statute does not expressly authorize the recording of such instruments in every county, make a deed as to land in another county recordable, or even prove itself by the record.⁹²

§ 132. Who is a Purchaser.

Under the principle of courts of equity which protects "a purchaser for valuable consideration without notice" against secret equities arising before he has purchased and paid his price, it is always understood that the conveyance to him is such as to give him the legal title; because, among equities, the oldest in time must prevail (*Qui prior est tempore potior est in jure*).⁹⁴ But we have

Code, §§ 1215, 1216, 2933 (also on revocation); Oregon, §§ 3035, 3036; Dakota Territory, Civ. Code, §§ 672, 673 (registry of power implied from that of revocation); Montana, § 261; Nevada, §§ 2596, 2597; also Idaho, § 3003.

⁹⁰ Ohio, Rev. St. § 4108, powers of attorney must be executed, acknowledged, certified; silent as to recording. Rhode Island, only statute about attorneys in fact (chapter 166, § 10). In Maine it would seem from chapter 73, § 17, that *Valentine v. Piper*, *supra*, is still the law. South Carolina, § 1776, does not mention powers of attorney. Georgia, § 2705, silent; deeds by attorneys sustained without reference to registry law. Washington, Misc. L. § 1366 et seq., no reference to power of attorney. In Mississippi, a letter of attorney is to be recorded, being deemed "a contract regarding land." *Hughes v. Wilkinson*, 37 Miss. 482.

⁹¹ *Gage v. Gage*, 10 Fost. (N. H.) 420; *Muldrow v. Robison*, 58 Mo. 331.

⁹² *Muldrow v. Robison*, *supra*.

⁹⁴ On "purchasers in good faith," see *Basset v. Nosworthy*, 2 White & T. Lead. Cas. Eq. 1, and notes. It is treated there as well with regard to, as
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seen that the laws in all the states now allow, or even demand, the recording of deeds, though the grantor's title is only equitable, and have almost always done so where it is an equity of redemption; and that in many states declarations of trust and title bonds which affect the grantor's title only equitably are fit subjects of recording. Hence, when the statute says that the deed first recorded shall prevail, it must often be a deed the grantee in which is not a purchaser within the old definition, but is such within the recording laws.⁹⁵ But a "stranger" to the grantor's title, not claiming under him, through the second deed, cannot take advantage of the failure to record the first and insist on the second deed as creating an outstanding title; and we need not quote the almost innumerable cases in which it is said that the title passes between the parties without recording.⁹⁶ Above all, the purchaser seeking to avoid the prior deed must show that the same estate is granted to him by the conveyance under which he claims himself. Thus an assignee for the benefit of creditors, to whom the debtor conveys all his estate, not exempt from legal process, has hardly ever been preferred as a purchaser, either to secret equities or to unrecorded deeds, for the plain meaning of the assignment is to give him whatever interest

aside from, the registry laws. But principles are in the main the same, both as to notice and as to the consideration of and completion of the purchase. *Grimstone v. Carter*, 3 Paige, 421. The notes give cases between the purchaser, on the one hand, and equities arising by contract, or resulting by operation of law, or from fraud practiced on a grantor, or fraud upon creditors.

⁹⁵ Where the law does not provide for recording a title bond, declaration of trust, etc., there is no reason why a subsequent unrecorded or badly-recorded deed, which passes the legal title, should not override it. See, however, *Allen v. Holden*, 32 Ga. 418. Otherwise where any of these instruments are made recordable, and thus put on the footing of conveyances.

⁹⁶ *Riley v. Southwestern R. Co.*, 63 Ga. 325; *Embry v. Conner*, 2 Sandf. (N. Y.) 98 (that is, a stranger, when sued in an ejectment by the grantee in an unrecorded deed, cannot set up a later recorded deed as outstanding title); *Rankin v. Miller*, 43 Iowa, 11 (same principle). And so the times of registry of deeds for several parcels do not affect the marshaling of a superior lien among the subpurchasers, *Harman v. Oberdorfer*, 33 Grat. 497; nor the running of the statute of limitations, *Gillett v. Gaffney*, 3 Colo. 351. A curious case in which the first recorded deed could not prevail is *Murphy v. Peabody*, 63 Ga. 522. And the conveyances or leases from one whose own title is unrecorded take preference according to the registry laws. *Davis v. Lutkiewicz*, 72 Iowa, 254, 33 N. W. 670. See, contra, *Flynt v. Arnold*, 2 Metc. (Mass.) 619.

the debtor then has, aside of other considerations running in the same direction.⁹⁷ It is the same where one gives a "blanket mortgage" on all his estate, or on all his land, even for a single debt, and for a present advance: he means only such estate as then actually belongs to him.⁹⁸ And wherever a conveyance or other recordable writing professes to give to the grantee all the grantor's estate, or "his interest," or "his remaining interest,"—though in one part of the writing there should be a broad grant of "the land," but the intent to trade on whatever interest the grantor may have can be gathered from the whole instrument,—the grantee will be postponed to an unrecorded deed; and one claiming under him will not stand in any better position.⁹⁹ An effort has been made to extend this theory to all quitclaim deeds in which the grantor does not warrant, or even assert, his ownership of the land, or of any named es-

⁹⁷ Griffin v. Marquardt, 17 N. Y. 28; Holland v. Cruft, 20 Pick. 32; Clark v. Flint, 22 Pick. 231 (though the creditors were to release, and did so). Contra, Wickham v. Martin, 13 Grat. 427, following the exploded case of Dey v. Dunham, 2 Johns. Ch. 182. In Ohio, mortgages take effect only from time of recording, and there a general assignment might have priority. See discussion in Kemper v. Campbell, 44 Ohio St. 210, 6 N. E. 566. The supreme court of the United States, however, postponed a secret vendor's lien in Bayley v. Greenleaf, 7 Wheat. 46. A late case is Campbell Printing Press & Manuf'g Co. v. Walker, 22 Fla. 412, 1 South. 59 (assignee is neither purchaser nor creditor). In states which, following the lead of Connecticut, had regulated assignments, fixing all their terms and effect by a sort of bankrupt law, this result becomes self-evident.

⁹⁸ In those states in which a grantee by quitclaim is not deemed a purchaser, this would naturally follow, as a blanket mortgage does not in any way affirm or warrant the ownership of any one tract. It would also follow from the consideration that "all my property" does not include a lot which I have conveyed in any way, nor an interest in a lot which I have excluded by a previous incumbrance. But this is only true within narrow limits. Thus, in Starling v. Blair, 4 Bibb (Ky.) 288, a mortgage of "all my lots in Frankfort which I own legally or equitably" was held to embrace a lot of which one had taken possession under an unfinished negotiation with the mortgagor, and on which he had put improvements. In Eaton v. White, 18 Wis. 517, a reservation in a mortgage of "so much as has been conveyed to different persons" was held not to exclude the interest given by a prior unrecorded mortgage.

⁹⁹ Marshall v. Roberts, 18 Minn. 405 (Gil. 365); Hope v. Stone, 10 Minn. 152 (Gil. 114); Chaffin v. Chaffin, 4 Gray, 280 (conveyance subject to former deeds is subject to those unrecorded and not brought to notice); Coe v. Persons Unknown, 43 Me. 432 (all right, title, and interest in township); Blan-

tate therein, but "releases and quitclaims" the land,—i. e. transfers such estate therein as he has at the time. And this view has been taken by the supreme court of the United States and by courts in Michigan, Iowa, Florida, Oregon, and Texas and formerly in Wisconsin, and it derives some force from the consideration that the grantor, by refusing to warrant, or even to assert, a full estate, throws discredit on his title, and thus on the good faith of the purchaser.¹⁰⁰ But in California quitclaim deeds have from an early day been recognized as a common way of conveying land, and the releasee has all the rights of a purchaser; and such is also the rule in Missouri and Illinois, and seems to be in Wisconsin and Indiana; while in Minnesota the statute, as amended in 1875, gives to quitclaim deeds like force in this respect as to warranty deeds; and Kansas has struck out an intermediate course.¹⁰¹ The second purchaser's deed must be valid in all respects. Thus, where the first purchaser has taken possession under his unrecorded deed, and holds it exclusively and adversely to the grantor, in many states the champerty

chard v. Brooks, 12 Pick. 47; Brown v. Jackson, 3 Wheat. 449; Callanan v. Merrill, 81 Iowa, 73, 46 N. W. 753.

¹⁰⁰ Following the principles stated in Oliver v. Piatt, 3 How. 333; May v. Le Claire, 11 Wall. 217; Dickerson v. Colgrove, 100 U. S. 578; Baker v. Humphrey, 101 U. S. 494; Postel v. Palmer, 71 Iowa, 157, 32 N. W. 257; Martin v. Morris, 62 Wis. 418, 22 N. W. 525 (seems no longer to be law in Wisconsin); Steele v. Sioux Val. Bank, 79 Iowa, 339, 44 N. W. 564. In Peters v. Cartier, 80 Mich. 124, 45 N. W. 73, the court, in denying to a quitclaim deed the character of "purchase," says: "Under the cloak of quitclaim deeds, schemers close their eyes to honest inquiries." So, also, American Mortg. Co. v. Hutchinson, 19 Or. 334, 24 Pac. 515; Laurence v. Anderson (Tex Sup.) 1 S. W. 379, following Taylor v. Harrison, 47 Tex. 454. In Goddard v. Donaha, 42 Kan. 754, 22 Pac. 708, there was implied notice, perhaps not strong enough against a purchaser by warranty deed. Also, Snow v. Lake's Adm'r, 20 Fla. 656.

¹⁰¹ Graff v. Middleton, 43 Cal. 341 (quitclaim deed is said to differ from warranty deed by not carrying after-acquired title). Inference in Corbin v. Sullivan, 47 Ind. 356, to like effect. As to Minnesota, see chapter 40, § 21, of Rev. St., as against prior decisions. For Missouri, see Munson v. Ensor, 94 Mo. 504, 7 S. W. 108, which holds the statute to be imperative, and relies on Fox v. Hall, 74 Mo. 315; Willingham v. Hardin, 75 Mo. 429; Campbell v. Gas-Light Co., 84 Mo. 352; and Sharp v. Cheatham, 88 Mo. 510. It is deemed settled for Illinois in Brown v. Banner Coal & Oil Co., 97 Ill. 214, on the authority of McConnel v. Reed, 4 Scam. 117; Kennedy v. Northup, 15 Ill. 154;

law (where it prevails) would render any conveyance by the latter void, and thus protect the first taker.¹⁰² The purchaser protected by the registry laws must be one "for valuable consideration." This does not mean that he must have paid an adequate price (though a purchase at a very low figure might, with other circumstances, prove bad faith),¹⁰³ but it means simply that a volunteer, or one to whom the land is conveyed for a "good consideration," such as love and affection for a wife and child, is not within the law.¹⁰⁴ One who takes a mortgage as security for an advance made at the time is to the extent of that advance considered a purchaser, as much so as if he had bought the land outright. The words "mortgagees" or "incumbrancers" after "purchasers" in a few of the latest statutes have been added only for greater certainty.¹⁰⁵ But where an abso-

Harpham v. Little, 59 Ill. 509; and other cases,—provided, as said in *Morgan v. Clayton*, 61 Ill. 40, the deed itself contains no words restricting its meaning.

¹⁰² *Godfroy v. Disbrow*, Walk. Ch. (Mich.) 260. The case might have been decided on the outstanding possessions being notice of the deed (see next section); perhaps on the ground that the receiving of possession is embraced in a true purchase, as is intimated in some cases.

¹⁰³ *Faitoute v. Sayre* (N. J. Ch.) 28 Atl. 711. The deed here passed upon conveyed "all the right, title, claim, and demand which the said party, etc., have in & to, etc." Also *Cutler v. James*, 64 Wis. 173, 24 N. W. 874, under Rev. St. §§ 2207, 2208, giving a form of quitclaim deed; but it would have been otherwise if the deed had released only "the right, title, and interest." In Kansas a quitclaim deed puts the purchaser on inquiry, and he may, according to circumstances, lose (*Johnson v. Williams*, 37 Kan. 179, 14 Pac. 537) or win (*Merrill v. Hutchinson*, 45 Kan. 59, 25 Pac. 215). In *Hockenhull v. Oliver*, 80 Ga. 89, 4 S. E. 323, the question was purposely left undecided.

¹⁰⁴ *Anthony v. Wheeler*, 130 Ill. 128, 22 N. E. 494; *Ryder v. Rush*, 102 Ill. 338. Marriage is a valuable consideration. The leading case of *Le Neve v. Le Neve*, 2 White & T. Lead. Cas. Eq. 109, in which the second grantee was only defeated by notice, was that of a marriage settlement. See contra (a full or adequate consideration), *Morris v. Daniels*, infra. note 114. But the unrecorded deed is good against volunteers. *Way v. Lyon*, 3 Blackf. (Ind.) 76; *Patton v. Moore*, 32 N. H. 382; *Boon v. Barnes*, 23 Miss. 136. A very small price may indicate fraud or notice. *Hoppin v. Doty*, 25 Wis. 573; *Peabody v. Fenton*, 3 Barb. Ch. 451.

¹⁰⁵ *Rowell v. Williams*, 54 Wis. 636, 12 N. W. 86, is express, but many cases in New York, Michigan, Wisconsin, Minnesota, where the law speaks only of purchasers, give preference to mortgagees, no question being raised. The doctrine grew up in the days of strict foreclosure, when the mortgagee was very much of a purchaser in the ordinary meaning of the word. In

lute deed is obtained in satisfaction of an antecedent debt, and still more where such a debt is secured by mortgage, and no security other than the personal liability of the grantor or mortgagor is given up in return, the grantee or mortgagee is not, according to the older cases, in the position of a purchaser in whose favor an unrecorded deed is set aside.¹⁰⁶ Yet in New York, where this doctrine was first announced, and in Michigan, Wisconsin, and Minnesota, the statute defines a purchaser as any person to whom any estate, etc., is conveyed for a valuable consideration, and we shall show in a later section that a creditor bidding in the grantor's lands at an execution or decretal sale; and putting the sheriff's certificate or commissioner's deed to record in good faith, is usually protected against unrecorded deeds.¹⁰⁷ But a deed of trust made by an insolvent debtor for the benefit of his creditors can never create a "purchaser" within the equity doctrine; and this is fully admitted in Tennessee, where, nevertheless, the latest decisions hold that the policy of the registry laws requires the postponement of any deed which might be recorded, and is not, to a registered deed of assignment. A resulting trust, or equity not capable of being put on record, would thus in that state occupy a better position than a title under an

Tate v. Liggat, 2 Leigh (Va.) 84, it is said that a mortgagee is, under the recording laws, only purchaser, not creditor.

¹⁰⁶ In *Dickerson v. Tillinghast*, 4 Paige, 215 (purchase in satisfaction of debt), it was urged that the covenants of title had put the purchaser's demand in better shape than it was before. So, also, *Twelves v. Williams*, 3 Whart. 485; *Rowan v. Adams*, 1 Smedes & M. Ch. (Miss.) 45; *Evertson v. Evertson*, 5 Paige, 644; *Powell v. Jeffries*, 4 Scam. (Ill.) 387; *Pickett v. Barron*, 29 Barb. 505. The reasoning of these cases, being based on the analogy of a transfer of negotiable paper in *Coddington v. Bay*, 20 Johns. 637, was much shaken by the well-known decision of the supreme court of the United States in *Swift v. Tyson*, 16 Pet. 1. The doctrine was receded from in part in *Padgett v. Lawrence*, 10 Paige, 170, and in *Love v. Taylor*, 26 Miss. 567, but is recognized in *Wood v. Chapin*, 13 N. Y. 509. The doctrine was ignored in *Muldrow v. Robison*, 58 Mo. 331. As to mortgage for antecedent debt, see *Constant v. American Baptist H. M. Soc.*, 53 N. Y. Super. Ct. 170.

¹⁰⁷ Minnesota, c. 40, § 25; New York, Rev. St. pt. 2, c. 3, § 37; Wisconsin, § 2242. The cases denying to one taking the land for a debt the character of purchaser generally arose on the claim of a child against the parent, or were otherwise suspicious. It was held in Ohio that to take a note at one day and grace, with mortgage, gave enough time to make a new consideration, and thus a purchase. *Smith v. Worman*, 19 Ohio St. 145.

unrecorded deed.¹⁰⁸ Where part of the price or advance is paid at the time, and the remainder of it is the satisfaction of an old debt, the purchaser is certainly protected as to the former part of the price or advance; while in New York, at least, he is, as far as the part of the price or security based on the old debt goes, postponed to the unrecorded deed.¹⁰⁹

At what time does he who in good faith buys land affected by an unrecorded deed become a purchaser for value under the registry laws? The rule to determine this has been drawn from the older rule of equity: When does he who buys the legal title to land reach the point at which he can hold against a prior equity? But it is modified by the language of some of the statutes, which declare the unrecorded deed void only against him who has his own deed first put upon record.¹¹⁰ The rule as to equities was fixed by the form of the "plea of purchaser without notice" in equity pleadings, and such a plea had to show that before receiving notice of the prior equity the purchaser had paid the price, and had also received his conveyance. One of these two facts, without the other, was held insufficient. And "where a man purchases an estate, and pays part and gives a bond for the residue, notice of an equitable incumbrance before payment was sufficient to stop payment, and to entitle the obligor to relief in equity against the bond."¹¹¹ Equity has in a

¹⁰⁸ Simpkinson v. McGee, 4 Lea (Tenn.) 432, relying on Myers v. Ross, 3 Head, 60; Knowles v. Masterson, 3 Humph. 619, overruling Cook v. Cook, 3 Head, 719, and Fain v. Inman, 6 Heisk. 5.

¹⁰⁹ In Glidden v. Hunt, 24 Pick. 221; Baggally v. Gaither, 2 Jones, Eq. 80; and Carroll v. Johnston, Id. 120 (in the last case in a contest with a title bond). —the purchaser, partly for an old debt, partly for a new advance, was sustained as to both.

¹¹⁰ By reference to the statutes quoted in notes 26–28, it will be seen that less than half of them confine their protection to purchasers who succeed first in getting their deed on record.

¹¹¹ The requisites of such a plea are fully stated in Snelgrove v. Snelgrove, 4 Desaus. Eq. 274, copied at large in the American notes to Basset v. Nosworthy, 2 White & T. Lead. Cas. Eq. 1; also in Daniell, Ch. Prac. (4th Am. Ed.), pp. 671, 672. The cases of Williamson v. Brown, 15 N. Y. 354, and Baker v. Woodward, 12 Or. 3, 6 Pac. 173, require also an averment that the vendor was in possession, or that he was seised, or claimed to be seised, which could hardly apply to wild lands, or to estates in remainder or reversion. The older leading cases are Frost v. Beekman, 1 Johns. Ch. 301;

few cases aided or protected one as a purchaser, who has paid his money in good faith, and who is "entitled to call for the legal title." Such protection is hardly compatible with the spirit and object of the registry laws, as it means helping one of two violators of these laws against another; but it has recently been applied in Virginia, so as to defeat an earlier mortgage, not registered for a number of years, in favor of a later purchaser, who took possession under an informal, unrecorded writing.¹¹² Where the purchaser has paid only a part of the agreed price, before receiving notice, actual or by the record, the courts have aimed to indemnify him, but would not interfere with the prior deed further than to the amount of, or in proportion to, the purchase money already paid.¹¹³ A subsequent purchaser, who undertakes to hold against an unrecorded deed, has the burden of proving that he has paid value; just as the purchaser of a negotiable note which is subject to "equities" has to prove that he took

Jewett v. Palmer, 7 Johns. Ch. 65; **Thomas v. Stone**, Walk. Ch. (Mich.) 117. In **Simpson v. Montgomery**, 25 Ark. 365, a buyer under a deed of trust was recognized as a purchaser (not, however, against an unrecorded deed, but under it), although he was indemnified by the parties in interest. The character of "purchaser for value" is stated in 2 Minor, Inst. 877, as requiring both payment and acquisition of the legal title before notice of the outstanding equity; claiming the authority of **Doswell v. Buchanan**, 3 Leigh, 381; **Mutual Assurance Soc. v. Stone**, Id. 235,—which do not bear him out. Leading cases on this side are also **Union Canal Co. v. Young**, 1 Whart. 410, and **Boone v. Chiles**, 10 Pet. 177, 212. The purchaser may not, after notice, pay a note not negotiable given for the land. **Blanchard v. Tyler**, 12 Mich. 339.

¹¹² **Campbell v. Nonpareil F. B. & K. Co.**, 75 Va. 291,—a hard case, making rough law. The court would have done better to declare the withholding of the deed of trust from the registry a fraud in fact. It relies on the doctrine of equity as stated in **Story, Eq. Jur.** § 64, in opposition to that stated by Minor, and on **Williamson v. Gordon**, 5 Munf. 257. The doctrine that the party who has paid for and acquired the equity may go on after notice to clothe his rights with the legal title is maintained by many cases quoted in the notes to **Basset v. Nosworthy**, supra. And see *infra*, **Bennett v. Titherington**.

¹¹³ **Evans v. Templeton**, 69 Tex. 375, 6 S. W. 843 (second purchaser not having paid more of his purchase money than the value of the land not previously conveyed, was referred to that). See **Blanchard v. Tyler**, supra; **Warner v. Wheeler**, 1 D. Chip. (Vt.) 159. And see, as to effect of payment in part, **Story, Eq. Jur.** § 64; **Id.** § 604a; and **Bennett v. Titherington**, 6 Bush, 192,—where the money was paid on an executory contract.

it for value in due course of trade.¹¹⁴ The older registry laws were sometimes construed as protecting only subsequent purchasers from the grantor in the unrecorded deed; but when he died it was thought that nothing passed by descent or devise to his heir or devisee, and that the purchaser from the latter took nothing. It may be safely stated that this construction is no longer given anywhere to the law. Where necessary, it has been amended so as to broaden its effect, and put purchasers from the heir or devisee under its protection. In Kentucky this was done as late as February, 1858.¹¹⁵

Recording is only notice to a purchaser from the same grantor. Thus where A fraudulently buys land in B's name, a sheriff's deed under execution against A is not notice to a purchaser from B, for such purchaser was not bound to search for executions against A, nor for sheriffs' deeds of his land.¹¹⁶ A purchaser for value, gaining the title as against a prior unrecorded deed, can give the land away as well as he may sell it. In other words, a volunteer, taking by deed or devise from a purchaser for value, has the full rights of the latter.¹¹⁷ But when the purchaser for value conveys back to his grantor, all equities or rights under unrecorded deeds revive, and

¹¹⁴ Morris v. Daniels, 35 Ohio St. 406. A purchase at execution, especially at more than two-thirds of the appraisement, was held proof. The recital in an ordinary deed was held not to be proof against a previous purchaser. See, also, Galland v. Jackman, 26 Cal. 79. But in many other cases it seems no proof of payment was made or insisted on. See, also, Brown v. Welch, 18 Ill. 343.

¹¹⁵ Dozier v. Barnett, 13 Bush, 457 (under the new statute); Hancock v. Beverly's Heirs, 6 B. Mon. 532; Harlan v. Seaton's Heirs, 18 B. M. 312, 326 (under the old law). The act of 1858, now part of the recording act, extends the old section to "innocent purchasers and creditors of the heirs or devisees of any grantor."

¹¹⁶ Crockett v. Maguire, 10 Mo. 34; and, generally, Smith v. Williams, 44 Mich. 240, 6 N. W. 662.

¹¹⁷ Leger v. Doyle, 11 Rich. (S. C.) 100 (case of a sheriff's deed, the bearings of which on the rights of creditors will be treated in a later section). It is said there: "The registry acts embrace deeds and conveyances not parol contracts to buy, written or unwritten; and a sheriff's conveyance is subject to the provisions of these acts in like manner as a conveyance from a private individual. Massey v. Thompson, 2 Nott & McC. 105." In this case, the plaintiff in an execution, bidding the land in for her debt, had delayed taking the sheriff's deed till an old unrecorded deed from the defendant came to light and was registered before hers.

can only be suppressed by a new conveyance to a purchaser for value.¹¹⁸ We must state in conclusion that the equity doctrine about purchasers without notice for value cannot be fully carried out under the registry laws. Under the old equity rule, among equities that which is prior in time must prevail. Only he who obtains the legal title, or at most he who can call for the legal title, earns the protection due to a purchaser. But where a statute directs that the conveyance of an equitable estate, or, what is more, that a declaration of trust or a title bond, shall be recorded, or lose its place against purchasers, it follows naturally that the second grantee in such a conveyance, declaration, or bond must be protected against the first; and the old doctrine must be molded into a new and analogous one, in which interest by an unrecorded deed takes the place of "equity," and interest by recorded deed the place of "legal title." One consequence, as seen supra, in Tennessee, is that greater respect is paid under the registry acts to resulting trusts arising from the unlawful or fraudulent use of trust funds—that is, to rights incapable of publicity through the records—than to rights arising from written, but unrecorded, instruments.¹¹⁹ It may be stated here that the assignment of a mortgage is, in the modern view, considered as a mere transfer of the debt, and the assignee has none of the privileges of a purchaser for value and without notice, unless the note secured by the mortgage is negotiable and he gains a title under the law merchant, with which we are not here concerned.¹²⁰

§ 133. What is Notice.

The effect of the recording laws in settling the ownership of land has been much weakened by the doctrine of notice. As soon as it is admitted that a conveyance from A to B is good between the parties, without being registered, it follows that if C consents to buy from A land so conveyed, which, as he knows, already belongs to B, or if he consents to lend him money on it by way of mortgage, he

¹¹⁸ Simpson v. Montgomery, 25 Ark. 365; Schutt v. Large, 6 Barb. 373; Story, Eq. Jur. § 610.

¹¹⁹ See note 108, supra.

¹²⁰ This matter has been treated in the chapter on "Incumbrances," section 111 (right of assignees).

commits a fraud upon B which a court of equity cannot allow to pass by, without interference and relief.¹²¹ But, where the statute demands recording, as it does in a number of states, only against a subsequent "purchaser for a valuable consideration without notice," even a court of law must decide in favor of B against C; for the latter, if he had notice, is not one of the parties whom the statute undertakes to protect.¹²²

¹²¹ The leading case on notice that will take the place of registry is *Le Neve v. Le Neve*, Amb. 436, reported also in 2 White & T. Lead. Cas. Eq. 35. There were houses in Middlesex subject to the register act (7 Anne, c. 20); an unregistered marriage settlement to the owner's first wife in 1719; a registered deed in favor of the second wife in 1744. An attorney, who had examined the first settlement, had by the husband been recommended to the second wife, to draw hers; and the knowledge of the attorney (who was also one of the trustees) was by Lord Hardwicke imputed as knowledge to her. The object of the act declared in the preamble being to secure purchasers against prior secret conveyances and fraudulent incumbrances, it was said not to apply to conveyances of which the purchaser has notice. The jurisdiction to relieve against the second deed, which was registered, was said to be in equity only. White & Tudor's notes to this case refer to many authorities as to what is "notice" aside of the registry laws, but, generally, where the purchaser gets in the legal title as against a prior equity,—all of which, perhaps, would apply under those laws as well, except where the statute has introduced the words "actual notice." On the registry laws, the opinion of Sir William Grant, M. R., in *Wyatt v. Barwell*, 19 Ves. 139, is quoted as regretting the decision in the principal case. One who buys with knowledge of the prior unrecorded deed, and records his own first, becomes a trustee by his own fraud, and as such is not allowed to strengthen his title against the older grantee. *Oliver v. Sanborn*, 60 Mich. 346, 27 N. W. 527. Though a local statute declared certain deeds fraudulent against "subsequent creditors" generally, a purchaser with notice was postponed to the unrecorded deed. *Van Rensselaer v. Clark*, 17 Wend. 25; *Varick v. Briggs*, 22 Wend. 543. See, on the subject of notice of unrecorded deeds, further: 4 Kent, Comm. 172, 179, 456; Story, Eq. Jur. §§ 397–400; Pom. Eq. §§ 613, 659–665, 692, 730, 759; Wade, Notice, p. 49 et seq. We cannot treat this subject as fully—especially with regard to implied notice—as is done in treatises on equity, our work being mainly intended for the examiner of titles, who will naturally advise against accepting a title whenever he finds anything suspicious.

¹²² Many such cases have been decided in states having no equity system at the time, and will be found *passim* hereafter. See, also, "Readings of Judge Trowbridge on the Provincial Registry Acts," 3 Mass. 573. Chancellor Kent (4 Comm. 172) points out that the American statutes generally speak of a "purchaser in good faith," or "without notice." Aliter, the English acts, under

There are two species of notice,—actual and constructive. The former means that knowledge has been brought home to the second purchaser. The latter is used in two senses,—the notice implied by the law from the lawful registry of the deed; and the notice implied by the law (and still more by that branch of the law known as equity) from certain facts which ought to “put a prudent man on inquiry,” or from the knowledge possessed by the agent of the second purchaser. Among the facts from which notice has been implied, the foremost is possession of the land conveyed by the grantee in the unrecorded deed.¹²³ We find, thus, that after a statute which forbids all change of title otherwise than by writing signed by the grantor, or even by writing signed, attested, and acknowledged, and after registry acts which aim to make all these writings matter of public record, the ownership of land may still depend on the proof of the most intangible facts,—such as the processes in a purchaser's mind, or on the conclusions which judge or jury may have framed on his line of thought. And it seems that the German plan of the Grundbuch (better known in this country as the Australian system), under which an entry on the public register is itself the conveyance, furnishes the only alternative to the uncertainties of “equitable notice.”¹²⁴

In North Carolina (as in Louisiana and under the French law) notice of any kind is not a substitute for recording, though it has its

which relief was given in equity only. *Doe v. Allsop*, 5 Barn. & Ald. 142. Question of notice said to be one for the jury. *Chiles v. Conley's Heirs*, 2 Dana, 21. See, also, *Jackson v. Burgott*, 10 Johns. 457, secus in Florida (*Griffin v. Fries*, 23 Fla. 173, 2 South. 266).

¹²³ A very good classification, with examples, is given in the notes to the California Civil Code, under section 1217. California cases there quoted are for actual notice (*Stanley v. Green*, 12 Cal. 148; *Galland v. Jackman*, 26 Cal. 79); for implied notice by possession incompatible with the vendor's title (*Smith v. Yule*, 31 Cal. 180; *Thompson v. Pioche*, 44 Cal. 516; *Unger v. Mooney*, 63 Cal. 586). Considering that a great many farms and more than half the houses in cities are occupied by renters, the possession of a party other than the owner pointed out by the record seems to us a very weak indication of an unrecorded deed, and wholly inadmissible as notice in a great commercial community.

¹²⁴ Chancellor Kent (4 Comm. 170) admits the inconveniences of the equitable doctrine of notice, and, on the other hand, the impossibility of excluding it altogether without sometimes aiding very gross frauds.

effect as to equities which do not arise from recordable deeds.¹²⁵ At an early day the legislatures of Massachusetts and Maine corrected this uncertainty by enacting that the unrecorded conveyance shall be void, except against those having actual notice; and this example has since been followed in Missouri.¹²⁶ The first effect of this change has been to explode in these states the often unreasonable presumption that the possession of land by the vendee is notice of the unrecorded deed he may happen to hold,¹²⁷ which has been carried in other states as far as if it had been established as a rule of evidence by positive law,—so that a purchaser at a distance, who knew nothing about the possession at all, and simply relied on the record, was held bound by it; and was so considered in the Maine and Massachusetts cases which arose before the statute.¹²⁸ But the retention

¹²⁵ *Hinton v. Leigh*, 102 N. C. 28, 8 S. E. 890.

¹²⁶ Maine, c. 73, § 8; Massachusetts, Pub. St. c. 120, § 4; Missouri, Rev. St. § 2420.

¹²⁷ *Porter v. Sevey*, 43 Me. 526; *Pomroy v. Stevens*, 11 Metc. (Mass.) 244; *Drey v. Doyle*, 99 Mo. 459, 12 S. W. 287; *Maupin v. Emmons*, 47 Mo. 304; *Whitman v. Taylor*, 60 Mo. 127.

¹²⁸ 2 Kent, Comm. 204; *Gouverneur v. Lynch*, 2 Paige, 300; *Tuttle v. Jackson*, 6 Wend. 213; *Moyer v. Hinman*, 13 N. Y. (3 Kern.) 180 (but occupation by squatters shows nothing, *Page v. Waring*, 76 N. Y. 463; and grantee having men at work on an unfinished dwelling is not such possession as gives notice, *Brown v. Volkening*, 64 N. Y. 76); *Fair v. Stevenot*, 29 Cal. 486; *Patton v. Moore*, 32 N. H. 384 (laying down the limitations); *Ely v. Wilcox*, 20 Wis. 531; *Taylor v. Lowenstein*, 50 Miss. 278; *Tucker v. Vandermark*, 21 Kan. 263; *Massey v. Hubbard*, 18 Fla. 688. The rule is thus stated in 32 N. H. 384, supra, as collected from older cases, and is approved in later cases: "If a person buys land of one person while it is in the open and visible possession of another, the purchaser will be held to have notice of everything relating to the title of the occupier which he would have learned by the most diligent inquiry. These principles were originally adopted as law in this country in cases of purchases of one party while another holds an unregistered deed [quoting, among other cases, *Landes v. Brant*, 10 How. (U. S.) 348]. The rule has been limited to cases where the character of the property is such as to admit of open and continuous possession, as buildings or improved lands (*Kendall v. Lawrence*, 22 Pick. 540), and where it is exclusive, but inapplicable to wild or forest lands (*Bell v. Twilight*, 22 N. H. 500; *Butler v. Stevens*, 26 Me. 484)." And it must be open and adverse. *Schwallback v. Chicago, M. & St. P. Ry. Co.*, 69 Wis. 292, 34 N. W. 128. In *Grimstone v. Carter*, 3 Paige, 421, the purchaser's knowledge of the outstanding possession is dwelt on. So, also, in *Hodge v. Amerman*, 40 N. J. Eq. 99, 2 Atl.

of possession by the grantor after an absolute deed has been put on record, unless it has been continued for a considerable time, does not raise any presumption of fact that any rights have been reserved in his favor (such as an express vendor's lien or unrecorded mortgage for the purchase money); and opinions as to its effect are divided.

257; in *Galley v. Ward*, 60 N. H. 331; *Coe v. Manseau*, 62 Wis. 81, 22 N. W. 155; *Lamoureux v. Huntley*, 68 Wis. 24, 31 N. W. 331; *Pique v. Arendale*, 71 Ala. 91. Possession by grantee's tenant is notice (contra, where grantor and grantee possessed jointly, as in *Watt v. Parsons*, 73 Ala. 202, and *McCarthy v. Nicrosi*, 72 Ala. 332). See, also, *Higgins v. White*, 118 Ill. 621, 8 N. E. 808; *Jaques v. Lester*, 118 Ill. 248, 8 N. E. 795 (in contest with grantee from devisee); *Chicago & E. I. R. Co. v. Hay*, 119 Ill. 499, 10 N. E. 29 (as to right of way in use); *Day v. Railroad Co.*, 41 Ohio St. 392 (same principle); *Tillotson v. Mitchell*, 111 Ill. 523 (possession by tenant); *Crawford v. Chicago, B. & Q. R. Co.*, 112 Ill. 321 (same principle); but possession by grantor is not notice of defeasance turning deed into mortgage, *Tuttle v. Churchman*, 74 Ind. 311; *Exon v. Dancke*, 24 Or. 110, 32 Pac. 1045; *Frear v. Sweet*, 118 N. Y. 454, 23 N. E. 910 (what kind of possession is notice to incumbrancers). There is a strong line of cases in Pennsylvania: *Lightner v. Mooney*, 10 Watts, 407 (possession equal to recording); if distinct and unequivocal, *Sailor v. Hertzog*, 4 Whart. 259; *Berg v. Shipley*, 1 Grant, 429; must be clear and notorious, *Martin v. Jackson*, 27 Pa. St. 504; *Meehan v. Williams*, 48 Pa. St. 238; *Krider v. Lafferty*, 1 Whart. 303 (though land was used only to cut willows). Contra, possession not notice of an unrecorded sheriff's deed, *Moyer v. Schick*, 3 Pa. St. 242; *Helms v. O'Bannon*, 26 Ga. 132; and *Helms v. May*, 29 Ga. 121 (possession itself notice); more recent, *Duff v. McDonough*, 155 Pa. St. 10, 25 Atl. 608 (attornment to mortgagee notice of surrender of redemption); *Long v. Kerrigan* (Ky.) 21 S. W. 99 (holder of title bond in possession); *Petrain v. Kiernan*, 23 Or. 455, 32 Pac. 158 (possession under resulting trust); *Rock Island & P. Ry. Co. v. Dimick*, 32 Ill. 291, 32 N. E. 291 (passageway against railroad); inclosure in a pasture of 28,000 acres good as notice, *League v. Buena Ventura Stock Co.* (Tex.) 21 S. W. 307; *Mallett v. Kaehler*, 141 Ill. 70, 30 N. E. 549 (possession by tenant); notice by possession lost by result of inquiry, *Minton v. N. Y. El. R. Co.*, 130 N. Y. 332, 29 N. E. 322; *Trumpower v. Marcey*, 92 Mich. 529, 52 N. W. 999; *Johnson v. Strong*, 65 Hun, 470, 20 N. Y. Supp. 392; unfenced graves are not possession, *Roussain v. Norton*, 53 Minn. 560, 55 N. W. 747; occupation during part of the year is not, *Boynton v. Rees*, 8 Pick. 329; possession compatible with record title not notice of any other, *Farmers' & Merchants' Nat. Bank v. Wallace*, 45 Ohio St. 152, 12 N. E. 439; possession not notice of unusual covenants in the deed, *Railway Co. v. Bosworth*, 46 Ohio St. 81, 18 N. E. 533; when possession is vacant, purchaser need not inquire of last occupant, *Miles v. Langley*, 1 Russ. & M. 39.

Even less effect can be given to the occupation of the former owner as tenant under successive grantees.¹²⁹

But, according to reason, and to what seems to the writer to be the better opinion, actual notice means no more than "knowledge" (in fact, the Ohio statute speaks of knowledge only, not of notice); and this need not have come home to the purchaser in any formal way, such as his receiving a communication from the grantee, or seeing the instrument; but such information of its existence as people generally deem sufficient to act on in their business is actual notice.¹³⁰ Such is also a recital in the deed through which the grantee takes his title, immediately or remotely.¹³¹ But, when a reference in one of the deeds making up the chain of title to other deeds or writings is only incidental (for instance, if it is in a part of the deed in which other lands are granted) the purchaser is not bound to pursue the inquiry; and he has no actual, and, it seems, not even constructive, notice of the matter which may be found in those deeds.¹³²

¹²⁹ Seymour v. McKinstry, 106 N. Y. 230, 12 N. E. 348, and 14 N. E. 194 (it is notice); Metropolitan Bank v. Godfrey, 23 Ill. 607 (notice that a deed absolute on its face is a mortgage); Bloomer v. Henderson, 8 Mich. 395 (not notice of reservation); Burt v. Baldwin, 8 Neb. 487 (not where grantor is tenant).

¹³⁰ Curtis v. Mundy, 3 Metc. (Mass.) 405 (such notice as it would be fraud to disregard); Pike v. Martindale, 91 Mo. 268, 1 S. W. 858 (knowledge is actual notice); and Ebersole v. Rankin, 102 Mo. 488, 15 S. W. 422 (pending suit is not notice of deed mentioned in the papers),—would not have been so decided in states allowing implied notice. Beatie v. Butler, 21 Mo. 318, and Vaughn v. Tracy, 22 Mo. 418, put the doctrine strongly, and are approved in Muldrow v. Robison, 58 Mo. 331. Oregon, in its first case on the subject (Moore v. Thomas, 1 Or. 201), requires notice strong enough to imply fraud.

¹³¹ Merrill v. Ireland, 40 Me. 569 (under a statute demanding actual notice); Chaney v. Rodgers, 54 Ga. 168; Neale v. Hagthrop, 3 Bland (Md.) 551; Oliver v. Piatt, 3 How. (U. S.) 333; Mason v. Payne, Walk. (Mich.) 459; Johnston v. Gwathmey, 4 Litt. (Ky.) 317; Christmas v. Mitchell, 3 Ired. Eq. 535. This is the strongest form of notice. Nelson v. Allen, 1 Yerg. (Tenn.) 360; Johnson v. Thweatt, 18 Ala. 741; Honore's Ex'rs v. Bakewell, 6 B. Mon. 67; Wailes v. Cooper, 24 Miss. 208; Baker v. Mather, 25 Mich. 51. The express vendor's lien is built on this doctrine. See Jackson v. Elliott, 49 Tex. 62; Robertson v. Guerin, 50 Tex. 317. See, also, Payne v. Abercrombie, 10 Heisk. (Tenn.) 161.

¹³² Discussed in Kansas City Land Co. v. Hill, 87 Tenn. 589, 11 S. W. 797 (party to a deed reciting existence of a will is not presumed to know its contents so as to be chargeable with a fraud upon it).

A notice carrying actual knowledge has been held too vague (even in England and in states that have not introduced the word "actual" into their statutes), and therefore not effective—First, when it comes from strangers to the adverse claimant, persons not representing him nor employed by him in the business (a distinction without much merit, but sustained by very high English authority);¹³³ second, and more justly, when the information goes only to the extent that some title or equity is outstanding, but does not show in whose favor, or where the document creating such title or equity can be found, and still more so if the purchaser, being so informed, undertakes an inquiry which turns out unsuccessful;¹³⁴ third, and last, when the unrecorded conveyance has actually been seen by, or read before, the purchaser, but under circumstances where he could not well suspect the identity of the land, nor remember its description,—as where lots are sold by number from a plat, and he comes himself to buy what he naturally thinks are other lots.¹³⁵ The states in

¹³³ *Barnhart v. Greenshields*, 9 Moore, P. C. 36 (notice, to be binding, must proceed from some one interested in the property). But in Massachusetts and Missouri (where actual notice is required) and in Maryland, knowledge, no matter whence derived, is notice. *Leiman's Estate*, 32 Md. 225; *Maupin v. Emmons*, 47 Mo. 304; *George v. Kent*, 7 Allen (Mass.) 16; *White v. Foster*, 102 Mass. 375. The Pennsylvania case of *Kerns v. Swope*, 2 Watts (Pa.) 78 (after *Wildgoose v. Wayland*, Gouldsb. 147, p. 65, and *Cornwallis' Case*, Toth. 187), also takes the ground that the statement of an unauthorized third person is not notice. Under the Ohio statute, which speaks of "knowledge at the time," it may be found that a notice, received years before the purchase, was forgotten. *Morris v. Daniels*, 35 Ohio St. 406; *Connell v. Connell*, 32 W. Va. 319, 9 S. E. 252. See, also, on facts constituting actual notice, *Stevens v. Morse*, 47 N. H. 532; *Den v. McKnight*, 11 N. J. Law, 385; *Bush v. Golden*, 17 Conn. 594; *Burkhalter v. Ector*, 25 Ga. 55.

¹³⁴ *Butler v. Stevens*, 26 Me. 484; *Wright v. Wood*, 23 Pa. St. 120; *Wilson v. McCullough*, Id. 440; *Williamson v. Brown*, 15 N. Y. 354; *Tabor v. Sullivan*, 12 Colo. 136, 20 Pac. 437. But, if the former grantee is known, want of knowledge of the kind of deed or of the measure of estate is no excuse. *Galland v. Jackman*, 26 Cal. 79. But mere "want of caution" is not fraud, nor equivalent to notice. *Grundies v. Reid*, 107 Ill. 304.

¹³⁵ *Armstrong v. Abbott*, 11 Colo. 220, 17 Pac. 517; *Vest v. Michie*, 31 Grat. (Va.) 149 (being subscribing witness to deed is not *per se* notice of contents). This is based on strong English authority. Witnesses, it is said, are only to authenticate the signature, and are not generally acquainted with the contents of the deed which they attest.

which the statute does not speak of actual notice declare the unrecorded deed void against purchasers and creditors, &c., not having notice thereof (as Texas), or a "bona fide purchaser" (as New Jersey), or a "purchaser for valuable consideration without notice" (as Virginia), a "deed taken without notice" (as in Georgia), or a "purchaser in good faith" (as Minnesota); or, like Rhode Island, they declare the deed good only as against the grantor and his heirs, etc., and leave the doctrine of notice to be worked out by the principles of equity. But all of these alike admit implied notice, aside of actual, and aside of the constructive notice which is given by possession.¹³⁶

The three leading features of implied notice are:

1. Notice to the agent is notice to the principal. It must come to the agent employed about the purchase; e. g. the lawyer who examines the title, or the broker who closes the trade. If the agent is one with full powers, in whose hands the purchaser has placed the funds, with which he can buy such land as he sees fit, it seems that notice to him would be equivalent to notice to the principal, and might be deemed "actual" for all intents and purposes.¹³⁷

2. Knowledge of the existence of a deed makes it the purchaser's duty to seek out the deed, and to find what its contents are. This has been extended to leases, and renders almost needless that clause of the recording acts which requires leases of more than one, three, five, or seven years to be registered.¹³⁸ But the constructive notice of a

¹³⁶ *Gardner v. Granniss*, 57 Ga. 539; *Sigourney v. Munn*, 7 Conn. 324; *Rupert v. Mark*, 15 Ill. 540. So in New York, *Cambridge Valley Nat. Bank v. Delano*, 48 N. Y. 326; *Reed v. Gannon*, 50 N. Y. 345, overruling *Dey v. Dunham*, 2 Johns. Ch. 182.

¹³⁷ *Le Neve v. Le Neve*, *supra*; *Watson v. Wells*, 5 Conn. 468; *Ingalls v. Morgan*, 10 N. Y. 178. In *Constant v. American Baptist Home Mission Soc.*, 53 N. Y. Super. Ct. 170, the agent was to lay out the money himself; hence actual notice, and so notice to attorney of creditor getting lien. *Polk v. Cosgrove*, 4 Biss. 437, Fed. Cas. No. 11,248. Contra, where knowledge comes to the agents, while not on the business in hand, *Armstrong v. Abbott*, 11 Colo. 220, 17 Pac. 517.

¹³⁸ *Kerr v. Day*, 14 Pa. St. 112, holds that tenant's possession is notice of an agreement by him to buy; and so *Knight v. Bowyer*, 23 Beav. 609, going back to *Taylor v. Stibbert*, 2 Ves. Jr. 437, where the agreement was separate from the lease. But the possession of the tenant is notice of his landlord's title. *Dickey v. Lyon*, 19 Iowa, 544; *O'Rourke v. O'Connor*, 39 Cal. 442;

deed arising from its registry operates only on those against whom the statute makes it notice. If it be not a deed from the same grantor under whom the purchaser takes title, he need not look at it. Hence, where the record leaves the title in A, the appearance of a deed from B to C does not set purchasers on inquiry to find the unrecorded transfer from A to B; and it would be the same if there were a deed from B back to A, reserving a vendor's lien.¹³⁹ Or if a deed from the same grantor, but not affecting the property which the subsequent purchaser comes to buy, should allude or even refer to an unrecorded deed which does affect it, the conscience of the purchaser is not affected, unless he has actually seen this deed. The opportunity he had of reading it is not equivalent to actual knowledge, and does not put on him the duty of inquiry.¹⁴⁰

3. Generally, whenever the proposed purchaser learns anything which renders the vendor's title suspicious, he is thereby put on inquiry, and must pursue this inquiry, at his peril, until he finds the unrecorded grant or incumbrance, or until he has exhausted all means of finding it.¹⁴¹ Hence, where one buys from a party who

Kerr v. Day, 14 Pa. St. 112; Pittman v. Gaty, 5 Gilman (Ill.) 186; Morrison v. March, 4 Minn. 422 (Gil. 325).

¹³⁹ Felton v. Pitman, 14 Ga. 530; Leiby v. Wolf, 10 Ohio 83 (deed by party not in chain of title); Corbin v. Sullivan, 47 Ind. 356; Mahoney v. Middleton, 41 Cal. 41 (see same case in later note); Thursby v. Myers, 57 Ga. 155. Even a mortgage for the purchase money from the grantee to the grantor is no notice of the deed of sale preceding it. But where two men exchange interests in the same land by two deeds, both unrecorded, he who claims under one of these deeds cannot repudiate the other. Wallace v. Silsby, 42 N. J. Law, 1; Roberts v. Bourne, 23 Me. 165 (following Bates v. Norcross, *supra*. Contra, Center v. Planters' & M. Bank, 22 Ala. 743; Lupton v. Cornell, 4 Johns. Ch. 262,—both of which showed indications of fraud or notice in fact.

¹⁴⁰ Kerns v. Swope, 2 Watts (Pa.) 78, *supra* (though purchaser actually saw the deed recorded on an insufficient acknowledgment). So, also, Mueller v. Engeln, 12 Bush. (Ky.) 441 (deed of land not notice of vendor's lien on chattels). Contra, Muldrow v. Robison, 58 Mo. 331. It seems that in Missouri, where actual notice is required, an improperly recorded deed may be used as an element to bring home actual notice. The case is perhaps supported by Hastings v. Cutler, 24 N. H. 481; Bohlman v. Coffin, 4 Or. 313; and Musgrove v. Bonser, 5 Or. 313. Knowledge of guardian giving bond under license is not notice of his selling and making deed. Dodge v. Nichols, 5 Allen (Mass.) 548.

¹⁴¹ Prickett v. Muck, 74 Wis. 199, 42 N. W. 256.

has himself no recorded deed, or, still more, who cannot show any title papers bringing the title down to himself, he has strong reasons to believe that his grantor is not the true owner, and cannot, compatibly with good faith, cut out an earlier purchaser from the same grantor by recording his own deed first.¹⁴²

There is a difference between the effect of notice (actual or constructive), and that of recording, upon the action of a subsequent purchaser. While, under the laws of many states, such a purchaser is protected against a prior unrecorded conveyance only if he has first put his own deed on record, and thus the recording of the first deed would defeat him, though he has laid out his money and received his deed, it is otherwise with notice in pais, which comes too late when the price or consideration has been paid, and the deed delivered to the later purchaser.¹⁴³

We deal elsewhere with the notice of a pending suit; but must here state that, where a proceeding in court does not operate technically as such notice, it cannot be relied on as notice, actual or implied, or as having probably come to the knowledge of a subsequent purchaser.¹⁴⁴

An intending purchaser who receives information about an unrecorded deed cannot defeat the notice by relying on his lawyer's assurance that the deed is void.¹⁴⁵ But facts which would otherwise amount to notice may be offset by the conduct of the holder of

¹⁴² *Logan v. Neill*, 128 Pa. St. 457, 18 Atl. 343 (purchase from buyer at tax sale who had indorsed and given away his certificate to another). Same principle in England against buyer from one who has no title papers, liable to all outstanding equities. *Hiern v. Mill*, 13 Ves. 114. *Contra*, *Colyer v. Finch*, 5 H. L. Cas. 905, where, on inquiry, a good reason was given for absence of title deeds. But, in *Rodgers v. Kavanaugh*, 24 Ill. 583, that the grantor's title is unrecorded is not deemed a ground for suspicion.

¹⁴³ *Constant v. University of Rochester*, 133 N. Y. 640, 31 N. E. 26.

¹⁴⁴ *Bourland v. Peoria Co.*, 16 Ill. 538; *Anthony v. Wheeler*, 130 Ill. 128, 22 N. E. 494 (proceedings for sale by administrator not notice of sale and deed), distinguishing *Stokes v. Riley*, 121 Ill. 166, 11 N. E. 877, which was a case of judgment lien. In like manner, where a deed of trust with power of sale is recorded, this is no notice of the proceedings that may be taken under it. The deed made under it must be recorded. *Bazemore v. Davies*, 55 Ga. 504. But notice of an instrument which gives one an option is notice of the option.

¹⁴⁵ *Gilbert v. Jess*, 31 Wis. 110. And so, if he is told of an unrecorded mortgage, and that it is paid, he buys at his own risk. *Price v. McDonald*, (990).

the unrecorded deed, who stands by, knowing that a purchase is intended, and fails to warn the buyer. This is hardly more than an equitable estoppel.¹⁴⁶ The estate of a purchaser without notice would lack its full value if he could not sell or give it away to any one he chooses, without regard to such notice as the latter may have, at least such as the latter may have gotten after the purchase in good faith. Thus, where B and C take deeds consecutively from A, and C having taken his last, but in good faith, and having become the owner by recording his deed first, D can buy from him (C), though he finds B's deed on record, lodged later, but dated earlier, than C's deed. The principle is laid down broadly that a purchaser with notice gets a good title from a purchaser without notice,¹⁴⁷ just as a purchaser without notice from one with notice.¹⁴⁸ A proposed purchaser finds a deed to his vendor from the former owner on the registry. Why should he look for deeds from the same grantor, that are recorded after that to his vendor, at all? The regular search of the record would be only for grants or incumbrances by his vendor, after the clear title is once traced to him. Hence, the proposed purchaser has at least no constructive or record notice of the deed earlier in date, but later in registration; and, if he had actual notice, he might well justify on the ground that he buys from the true owner.¹⁴⁹

¹ Md. 403; *Musgrove v. Bonser*, 5 Or. 313, where the purchaser was told of an improperly recorded deed.

¹⁴⁶ *Clarke v. Morris*, 22 Ill. 434; *Wendell v. Van Rensselaer*, 1 Johns. Ch. 344.

¹⁴⁷ *Doyle v. Wade*, 23 Fla. 90, 1 South. 516; *Hooker v. Pierce*, 2 Hill, (N. Y.) 650. The syllabus, in report and digest, of *Van Rensselaer v. Clark*, 17 Wend. 25, intimates the contrary; but the case shows that the grantee in the first recorded deed had notice of the older and last recorded. *French v. Loyal Co.*, 5 Leigh (Va.) 627. *Mahoney v. Middleton*, 41 Cal. 41, is exactly like it; *Pierce v. Faunce*, 47 Me. 507, sustains the text; and *Page v. Waring*, 76 N. Y. 463, seems to set the matter at rest. In a case not arising under the registry laws,—*Henninger v. Heald* (N. J. Ch.) 29 Atl. 290,—it was held that the purchaser with, from the purchaser without, notice is not protected, when he took part in the fraud on which an equity rests.

¹⁴⁸ *Lee v. Cato*, 27 Ga. 637; *Bryant v. Buckner* (Tex. Sup.) 2 S. W. 452; *Coffin v. Ray*, 1 Metc. (Mass.) 212 (attaching creditor); *Fallass v. Pierce*, 30 Wis. 443 (intermediate grantees in bad faith, yet upheld).

¹⁴⁹ See cases collected in *Hare & Wallace's notes to Basset v. Nosworthy*.

There is a line of cases, often ranged under the recording laws, though not growing directly out of them, where a deed spread on record, not through any fault of the register in transcribing it, but in its original by the mistake of the draftsman, misdescribes the land conveyed, so that subsequent purchasers may be misled, and to correct the description as against them would defeat the object of the law, which refers purchasers to the public record. The rule is that where the misdescription is merely formal, or even if the sense is doubtful between the property meant and another tract, the true intention will prevail;¹⁵⁰ where the description was plainly wrong and misleading, a subsequent purchaser in good faith must prevail, as he would, indeed, aside of any recording laws.¹⁵¹

The courts of North Carolina have rejected the doctrine of notice entirely. An unrecorded deed is void as against a subsequent purchaser, no matter how clear and formal notice he may have had.¹⁵²

§ 134. Rights of Creditors.

NOTE. The clause of the recording law which relates to purchasers, mortgagees, or incumbrancers is nearly always the same as that on which the rights, if any, of creditors having only a judicial lien on or right to the land in question rests. Hence the place in the several statutes will not be referred to in the notes to this section, being pointed out in notes to former parts of this chapter.

While every state protects subsequent purchasers against unrecorded deeds, the several American commonwealths differ widely in the protection which they afford to the creditors of the grantor. Many of them do not profess to give them any protection at all. The word "creditor," when used in any such statute, means (with a few exceptions, shown hereafter) one who has, by judgment, attach-

Trull v. Bigelow, 16 Mass. 418; *Somes v. Brewer*, 2 Pick. 184; *Day v. Clark*, 25 Vt. 402; *Connecticut v. Bradish*, 14 Mass. 296; *Ely v. Wilcox*, 20 Wis. 530.

¹⁵⁰ *Wolfe v. Dyer*, 95 Mo. 545, 8 S. W. 551. Description helped out by proof of possession and cultivation. *Salisbury v. Andrews*, 19 Pick. 252; *Partridge v. Smith*, 2 Biss. (U. S. C. C.) 183, Fed. Cas. No. 10,787 (township and range transposed); *Wallace v. Furber*, 62 Ind. 103; *Rodgers v. Kavanaugh*, 24 Ill. 583.

¹⁵¹ *McLouth v. Hurt*, 51 Tex. 115.

¹⁵² *Quinnerly v. Quinnerly*, 114 N. C. 145, 19 S. E. 90.

ment, execution, or other process, obtained a lien on a defendant's land, which lien comes into conflict with an unrecorded deed made by such defendant.¹⁵³ At one extreme of the line, most favorable to such creditors, seemingly stands Maryland, where, under one clause of the law, a conveyance takes effect only from its registry; but this is greatly modified by other clauses.¹⁵⁴ Really the most favorable to creditors is Tennessee, and, in the contest with mortgages, if not with absolute deeds, Ohio. At the other extreme, in its late course of decisions, is Indiana, where a creditor can never, by mere proceedings at law, become a purchaser; next, New York¹⁵⁵ and the states copying its registry act, under which the subsequent purchaser is only preferred when he has himself (free from notice) obtained his deed, and has put it first to record.

Michigan, Wisconsin, and Wyoming have copied the principal clause of the New York law without change or addition; but a prac-

¹⁵³ Loughridge v. Bowland, 52 Miss. 546. There are cases in which the withholding of a deed from record has been held to avoid it against subsequent creditors; but this only on the ground of fraud, the grantee giving his grantor a false credit, not in obedience to the recording laws. See, however, below, as to Maryland and South Carolina, where subsequent creditors enjoy a special protection. Also, Blackman v. Preston, 123 Ill. 385, 15 N. E. 42.

¹⁵⁴ Maryland, Pub. Gen. Laws, art. 21, § 14.

¹⁵⁵ Chancellor Kent states the divergence of the laws of New York and Pennsylvania, as established in his time, thus: "A mortgage not registered has preference over a subsequent docketed judgment; and the statute regulations concerning the registry of mortgages and the docketing of judgments do not reach the case. A mortgage unregistered is still a valid conveyance, and binds the estate, except as against subsequent bona fide purchasers and mortgagees whose conveyances are recorded. If, therefore, the purchaser at the sale on execution under the judgment has his deed first recorded, he will then gain a preference, by means of the record, over the mortgage, and the question of right turns upon the fact of priority of the record in cases free from fraud. The rule in Pennsylvania is different, and the docketed judgment is preferred,—and not unreasonably; for there is much good sense, as well as simplicity and certainty, in the proposition that every incumbrance, whether it be registered deed or docketed judgment, should, in cases free from fraud, be satisfied according to the priority of the lien upon the record, which is open for public inspection." He quotes the following cases for the New York doctrine: Jackson v. Dubois, 4 Johns. 216; Jackson v. Terry, 13 Johns. 471; Jackson v. Town, 4 Cow. 605; Ash v. Ash, 1 Bay (S. C.) 304; Ashe v. Livingston, 2 Bay, 80; Penman v. Hart, Id. 251; Hampton v. Levy, 1

tical improvement in favor of the creditor has been brought about, both in New York itself and in these states—in Wisconsin, as early as 1858; in Michigan, in 1875, by a provision in the law governing executions, under which the sheriff, immediately after a sale of land and the payment of the purchase money, and without waiting for the time of redemption to expire, whether the bidder is a stranger, who pays in money, or the plaintiff, who pays with his judgment, gives him a certificate, which may be recorded. If such a certificate or a regular sheriff's deed, which by the law is deemed a conveyance by the defendant, direct and not mediate, reaches the record before a prior deed of which the purchaser has no notice, the purchaser by sheriff's deed will take precedence; and the deed made by administrator or executor who has sold the decedent's land for the payment of debts, or a commissioner's deed made under a foreclosure sale, would have the like preference.¹⁵⁶

In California, the Dakotas, Montana, and Idaho, a clause which, like the New York law, protects only those who can obtain the first registry, is followed by another in these words: "An unrecorded instrument is valid as between the parties thereto and those who have notice thereof," but it does not seem that judgment or attaching creditors are benefited by this addition. ¹⁵⁷

The Georgia statute, aside of the time given within which the

McCord, Eq. 114. For the Pennsylvania rule: Semple v. Burd, 7 Serg. & R. 286; Friedley v. Hamilton, 17 Serg. & R. 70. The references to the recording statutes have been made in the notes to section 127. His South Carolina authorities are no longer applicable in that state.

¹⁵⁶ Hetzel v. Barber, 69 N. Y. 1, which relies on Jackson v. Chamberlain, 8 Wend. 620; Jackson v. Post, 15 Wend. 588; Hooker v. Pierce, 2 Hill, 650; Cooper v. Galbraith, 3 Wash. C. C. 546, Fed. Cas. No. 3,193. In like manner the deed of an administrator selling under license must be recorded first in a contest with a sheriff's deed. Harris v. Arnold, 1 R. I. 125 (as to sheriff's certificates); Taylor v. Gladwin, 40 Mich. 232; Drake v. McLean, 47 Mich. 102, 10 N. W. 126; Wisconsin, St. § 3000. A creditor buying under his own execution is not protected (Main v. Bosworth, 77 Wis. 660, 46 N. W. 1043). A purchaser at judicial sale in Illinois (McNitt v. Turner, 16 Wall. 352) is protected.

¹⁵⁷ Frey v. Clifford, 44 Cal. 335; Vassault v. Austin, 36 Cal. 691 (the bearing of this case on the rights of creditors is not clear); Bank of Ukiah v. Petaluma Sav. Bank, 100 Cal. 590, 35 Pac. 170 (unrecorded mortgage good against judgments and attachments).

deed may be registered, like that of New York, only protects those whose deed is first put to record. Here, also, the only gain to creditors is the priority which the purchaser under a sheriff's, commissioner's, or administrator's deed may obtain by its speedy registry.¹⁵⁸

The old Maryland statute, under which recording was necessary to pass the title, has long since been greatly modified; and, "as against all creditors who have become so before the recording of such deed, and without notice thereof, such [unrecorded] deed shall have validity only as a contract for conveyance,"—whatever that means. It has been held under this clause that the equitable lien of an unrecorded mortgage is preferred to a creditor whose debt was contracted before the mortgage was given; but subsequent creditors acquiring their lien, either by process of law or by being provided for in a general deed of trust for the benefit of creditors, are preferred. But it seems that even subsequent creditors must be free from actual notice before they obtain their lien.¹⁵⁹

Slightly more favorable to the creditor than the New York statute are those which protect the purchaser, without requiring that he have his deed first put upon record; as, under such a provision, a sale at execution or under decree might be upheld, though not yet perfected by sheriff's or commissioner's deed. Such are the statutes of Ohio and Indiana. Better still is the Rhode Island act declaring the unrecorded deed void, with the only proviso that "between the parties it shall be binding"; or the Massachusetts law, under which such a deed is good "against the grantor, his heirs or devisees, or persons having actual notice"; in Connecticut and Vermont, "against the grantor and his heirs." And the Maine and New Hampshire statutes are similar. But, in the states of Illinois, Minnesota, Nebraska, Delaware, Virginia, West Virginia, Kentucky, North Carolina, Tennessee, Arkansas, Florida, Mississippi, and Texas, creditors are expressly named; and in New Jersey, since

¹⁵⁸ *Davie v. McDaniel*, 47 Ga. 195 (administrator's deed); *Winter v. Jones*, 10 Ga. 190 (sheriff's deed).

¹⁵⁹ *Sixth Ward Bldg. Ass'n v. Willson*, 41 Md. 506; *Carson v. Phelps*, 40 Md. 73; *Johnston v. Canby*, 29 Md. 211. In *Phillips v. Pearson*, 27 Md. 251, the unrecorded mortgage had been recognized by the purchaser in his deed; and, but for the contrary course, decisions in Louisiana, the judgment sustaining such a mortgage would be a matter of course.

1884, the unrecorded instrument is ineffectual as against subsequent judgment creditors. In some of the statutes, as in that of Mississippi, the order of words is such that "without notice" applies to creditors as well as to purchasers; while the Kentucky statute speaks of "purchasers without notice, or any creditors." The courts have, however, in the interpretation of the recording laws, paid less heed to such nice distinctions than to their own feelings on what is known as "equitable notice"; and, both in Mississippi¹⁶⁰ and in Kentucky, the creditor proceeding by execution or attachment may be stopped in the pursuit of the defendant's land by notice of an unrecorded deed, at any time before there has been a sale. The law in the latter state was fully digested by a decision of its court of appeals in 1875.¹⁶¹ On the other hand, the courts

¹⁶⁰ Creditors are affected by notice in Mississippi. *Dixon v. Lacoste*, 1 Smedes & M. 70. But, overruling a case in 5 Smedes & M. 545 (*Cohen v. Carroll*), it is held in *Harper v. Tapley*, 35 Miss. 506; *Taylor v. Lowenstein*, 50 Miss. 278; *Humphreys v. Merrill*, 52 Miss. 92,—that, where the creditor is not affected by notice, the execution purchaser can hold his purchase. The purchaser under the execution is not affected when the creditor has no notice. *Nugent v. Priebatsch*, 61 Miss. 402. A docketed justice's judgment is preferred to unrecorded deed. *Heirmann v. Stricklin*, 60 Miss. 234; *Clark v. Duke*, 59 Miss. 575 (assignee of judgment protected though plaintiff had notice).

¹⁶¹ The Kentucky doctrine is thus laid down by Judge Lindsay in the case of *Low v. Blinco*, 10 Bush, 331: "In the earlier cases it was held that a deed not lodged within the prescribed time was absolutely void as to any creditor. In *Morton v. Robards*, 4 Dana, 258, this construction of the statute was repudiated, the court holding that the legislature intended to regulate legal conveyances, and to leave untouched the equities of the parties, and that, while the legal title of a party not lodging his deed for record within eight months from its date was not good, yet his equity was unimpeachable, etc. In *Halley v. Oldham*, 5 B. Mon. 233, the correctness of this doctrine was doubted. It was, however, conceded that, if the execution creditor was himself the purchaser, then notice to him, before the purchase, of the existence of the unrecorded deed, would deprive him of its fruits, and that a court of equity might compel him to relinquish any advantage. Reconciling the reported cases, we deduce the following views: (1) A purchaser at an execution sale, who has no notice of the title bond or deed that has not been recorded within the prescribed time, will be protected in his title even in a court of equity. (2) A purchaser with notice will also be protected in case the execution creditor was in good faith, and without notice. Under such circumstances, the creditor has the right to sell, and the purchaser neces-

of Tennessee, while her statute contains the words "without notice," have steadily held that these words do not apply to creditors, and that they, though notified of the unrecorded deed at the very time when they obtain their lien by attachment or judgment, nevertheless have priority; and this has become a landmark in the law of that state,¹⁶² in full agreement with the mother state North Carolina, where the doctrine of "equitable notice" is unknown.¹⁶³ But in Minnesota, where, to remove all doubts, the revisers, in 1858, introduced into the statute the unequivocal words, "against any attachment levied thereon, or any judgment lawfully obtained," the courts have ingrafted the distinction that notice to the creditor after the acquisition of his lien is unavailing; but, if he has notice before he has perfected his lien, he is "affected" by the unrecorded deed.¹⁶⁴

In Texas, unless the creditor has notice before his execution or attachment is levied, either by the record or otherwise, his lien,

sarly takes all the title that the creditor can require the sheriff to sell. (3) That notice to the purchaser after the purchase does not affect him. He is, by his purchase, invested with an inchoate legal title, which he has the right to perfect by conveyance from the sheriff; and this right does not depend upon his being a stranger; the execution creditor is as much entitled to protection as a stranger. (4) That notice to the creditor at any time before he may purchase affects his conscience, and he may be compelled, in obedience to the equity evidenced by the bond or unrecorded deed, to transfer the legal title to the party."

¹⁶² Old Tennessee Code, § 2072, New, § 2887: "Shall have effect between the parties, their heirs and representatives, without registration, but as to other parties, not having notice of them, only." etc. Stanley v. Nelson, 4 Humph. 484; Vance v. McNairy, 3 Yerg. 176; Shields v. Mitchell, 10 Yerg. 1; Lyle v. Longley, 6 Baxt. 286; and incidentally in Coward v. Culver, 12 Heisk. 540.

¹⁶³ But "mortgages and deeds of trust" only are invalidated. The grantee gains no equity by the creditor's knowledge of the unregistered instrument. Dewey v. Littlejohn, 2 Ired. Eq. 495.

¹⁶⁴ Dunwell v. Bidwell, 8 Minn. 34 (Gil. 18) (only judgments rendered since law of 1858); Shaubhut v. Hilton, 7 Minn. 506 (Gil. 412) (misdescription in levy was corrected in favor of judgment lien holder against grantee in unrecorded deed); Welles v. Baldwin, 28 Minn. 408, 10 N. W. 427 (docketed judgment over assignment of title bond); Dutton v. McReynolds, 31 Minn. 66, 16 N. W. 468; Golcher v. Brisbin, 20 Minn. 453 (Gil. 407). Contra, where creditor affected by notice, Baker v. Thompson, 36 Minn. 314, 31 N. W. 51; Coles v. Berryhill, 37 Minn. 56, 33 N. W. 213 (judgment lien only against land standing of record in defendant's name).

and the rights of the purchaser under his process, are preferred to the unrecorded deed.¹⁶⁵

In Alabama, ever since 1852 (though from that year till 1887 there was no judgment lien), protection was given to "purchasers, mortgagees, and judgment creditors having no notice," and this clause has been steadfastly construed as postponing the grantee under the deed to the claims of a creditor who has recovered his judgment before the deed was put to record, though he only perfected his lien by execution (which he might now do by docketing) after the registration of the deed. Thus, a deed executed after the judgment may be better than one which is executed before, but put to record afterwards. The creditor is, however, affected by notice of the unrecorded instrument (and possession is held to be good notice) coming to him before recovery of the judgment, just as a purchaser or mortgagee is affected by it. A late decision has further strengthened the position of creditors; for it is now held, that when a conveyance is purposely withheld from the records, in order to spare the grantor's credit, it is thereby rendered fraudulent as against creditors.¹⁶⁶

In the New England states the general language of the recording law embraces creditors,—at least, those who are not affected by notice before gaining the lien of execution or attachment. And, whenever the grantee in a deed neglects to have it put to record, he has always been postponed to an attaching creditor, though notice was brought home to the latter before he had time to recover judgment, much less to have the land sold or set over to him on execution; and this, though implied trusts in favor of third persons may be set up against the claims of the attaching or execution creditor. It was the usual course in these states to "set off" to the execution creditor the land levied upon, at its appraised value, and

¹⁶⁵ Grace v. Wade, 45 Tex. 523; Stevenson v. Texas Ry. Co., 105 U. S. 703. See Rev. St. art. 4612, Pasch. Dig. art. 4994.

¹⁶⁶ Notice as effectual as registration. Harris v. Carter, 3 Stew. (Ala.) 238; Old Code (1852) §§ 2166, 2167; Watt v. Parsons, 73 Ala. 202; Tutwiler v. Montgomery, Id. 263 (possession is notice); Wood v. Lake, 62 Ala. 489 (history of the rule); Chadwick v. Carson, 78 Ala. 116; Smith v. Jackson, 56 Ala. 25 (sale by administrator for heir does not make him a judgment debtor); Lehman, Durr & Co. v. Vanwinkle, 92 Ala. 443, 8 South. 870 (purposely withheld); Mobile Sav. Bank v. McDonnell, 87 Ala. 736, 6 South. 703 (otherwise not).

he thus becomes a purchaser;¹⁶⁷ while, in most of the Western states, when the land is sold subject to redemption, the sheriff at once gives a "certificate" to the highest bidder on payment of the price, which makes him a purchaser, within the words of the Iowa statute, although in that state, as in New York, the mere creditor, though without notice at the time of gaining his lien by judgment or attachment, finds no assistance in the registry law; but he becomes a "purchaser" when he buys at his own execution.¹⁶⁸

The South Carolina law is very peculiar. Since 1843, as to chattel mortgages, and, under the present revision, as to all recordable instruments, the unrecorded deed is void as against "subsequent creditors and purchasers without notice." Hence, special regard

¹⁶⁷ *Woodward v. Sartwell*, 129 Mass. 210 (the deed was purposely withheld from record by the grantee). For the position that an attaching creditor stands like a purchaser, *Marshall v. Fisk*, 6 Mass. 24; *McMechan v. Griffing*, 9 Pick. 537; *Roberts v. Bourne*, 23 Me. 165. Notice must come home before the attachment is levied. *Stanley v. Perley*, 5 Me. 369; *Emerson v. Littlefield*, 12 Me. 148. But in Vermont it seems that an unrecorded deed, as well as a resulting trust, would prevail against an attachment without notice, though in *Hart v. Farmers' & Merchants' Bank*, 33 Vt. 252, where this is intimated, there was notice. The great case of *De Wolf v. Sprague Manuf'g Co.*, 49 Conn. 282, turned rather on the invalidity of the prior mortgage than its defective registration. The meaning of the Rhode Island act is fully explained in *Harris v. Arnold*, 1 R. I. 126. *Houghton v. Davenport*, 74 Me. 590, puts a resulting trust on a higher plane than an unrecorded title. The words of Judge Redfield in the Vermont case quoted are remarkable. "There was a time within my recollection, when it was considered that the equity of a creditor was superior to that of a purchaser," but that time had evidently gone by. In New Hampshire, the right of an attaching creditor who has no notice when attaching is acknowledged, but possession under unrecorded deed is constructive notice, though unknown to the creditor. *Galley v. Ward*, 60 N. H. 331. In *Houghton v. Davenport*, 74 Me. 596, an unrecorded deed, having been made to carry out a resulting trust, was sustained against an attachment.

¹⁶⁸ *Moorman v. Gibbs*, 75 Iowa, 537, 39 N. W. 832 (lien obtained even without notice postponed); *Norton v. Williams*, 9 Iowa, 528; *Chapman v. Coats*, 26 Iowa, 288 (same principle); *Evans v. McGlasson*, 18 Iowa, 150; *Halloway v. Platner*, 20 Iowa, 121; *Gower v. Doheney*, 33 Iowa, 36; *Rankin v. Miller*, 43 Iowa, 11 (creditor or third person buying and getting certificate protected); *Parker v. Pierce*, 16 Iowa, 227 (quoting Kent's New York and Old South Carolina cases); *First Nat. Bank v. Hayzlett*, 40 Iowa, 659; *Hoy v. Allen*, 27 Iowa, 208; *Ettenheimer v. Northgraves*, 75 Iowa, 28, 39 N. W. 120.

is paid to the interests of those who, after the execution, but before the registry of a conveyance or mortgage, and without notice thereof, give credit to the grantor or mortgagor. A purchaser under execution must be preferred in two cases,—as a purchaser, if he bought and got his sheriff's deed before actual notice or notice by the record; and for the benefit of the purchasing creditor, if the latter gave the credit without knowing of the unrecorded conveyance or incumbrance.¹⁶⁹

In New Jersey, the statute protects "subsequent judgment creditors without notice" as well as subsequent purchasers and mortgagees. Hence, a deed in that state, until recorded, or unless the creditor has notice, has no effect against the judgment creditor's lien. The word "subsequent" is not referred to the time when the debt is contracted, but to the fact that the lien arises after the delivery of the deed.¹⁷⁰

In Virginia, the protection is given to "subsequent purchasers for valuable consideration without notice and creditors," almost in the exact words of the Kentucky statute; but the construction has been much more literal, and much more favorable to the creditor. He can only be defeated by notice; and possession under an unrecorded deed is not notice of its contents. But it seems that a decree enforcing a contract for land need not be docketed to become a good notice. The wording of the West Virginia statute is less favorable to creditors, the qualifying words "without notice" applying to them as well as to purchasers; but it has not, since its divergence from the statute of the mother state, been passed upon, so as to determine the rights of creditors.¹⁷¹

¹⁶⁹ *McKnight v. Gordon*, 13 Rich. Eq. (S. C.) 222. There is a review of all the South Carolina cases on the subject before 1866. The sheriff's deed, not the sale, secures the bidder against unrecorded deeds. *Leger v. Doyle*, 11 Rich. Law, 109 (case to which the act of 1843 did not apply).

¹⁷⁰ New Jersey, Supp. Revision, "Conveyances," 20; *Hunt v. Swayze* (N. J. Sup.) 25 Atl. 850. An amendment of 1884 has rather strengthened the position of the creditor. In *Hodge v. Amerman*, 40 N. J. Eq. 99, 2 Atl. 257, the creditor was defeated by the notice implied from open possession.

¹⁷¹ *Robinson v. Commercial & Farmers' Bank* (Va.) 17 S. E. 759; *Guerrant v. Anderson*, 4 Rand. (Va.) 208; *McClure v. Thistle*, 2 Grat. 182; *Dabney v. Kennedy*, 7 Grat. 317. The Old Code (1849) said, "All creditors and subsequent purchasers for valuable consideration without notice."

Nebraska uses this language: "Void as to such creditors and subsequent purchasers without notice whose deeds, etc., shall be first recorded." Little, if any, force has been given to the word "creditors" added to the New York clause; for an execution purchaser who does not get the sheriff's deed on record before a deed antedating the judicial lien is recorded is not protected against the latter.¹⁷²

In Kansas, also, the statute seems to give creditors some protection, the unrecorded deed being void except as between the parties and those having actual notice; but a creditor, though having no notice of such an instrument, can attach only the interest left thereby in the debtor, if any; and if the creditor have no notice, even at the time of the sheriff's sale, the purchaser, buying with such notice, cannot hold against the unrecorded deed. In short, the statute has been construed to benefit purchasers only, though the buyer at an execution or judicial sale might profit by it as soon as his sale becomes definitive, and before he has the sheriff's or commissioner's deed to lodge with the register for record.¹⁷³

In Texas, on the other hand, the lien gained by a judgment creditor by lodging his abstract for record (and, it seems, any other judicial lien), if acquired without notice of an unrecorded deed, takes precedence over the unrecorded deed.¹⁷⁴

In Florida, not only the purchaser without notice at an administrator's sale is preferred to the grantee in an unrecorded deed, but

¹⁷² *Hubbart v. Walker*, 19 Neb. 97, 26 N. W. 713. In *Galway v. Malchow*, 7 Neb. 285, the difference in the wording and effect of the statutes in Illinois on one hand, Wisconsin and Nebraska on the other, is fully discussed.

¹⁷³ *Northwestern Forwarding Co. v. Mahaffey*, 36 Kan. 154, 12 Pac. 705; *Williams v. Moorehead*, 33 Kan. 615, 7 Pac. 226; *Coon v. Browning*, 10 Kan. 85; *Swarts v. Stees*, 2 Kan. 236. The exposition of the Kentucky law (see note 161) seems to fit Kansas very nearly.

¹⁷⁴ The decision of *Price v. Cole*, 35 Tex. 461, disregarding the rights of creditors, is overruled in *Grace v. Wade*, 45 Tex. 522. This relies on the literal reading of the statute, and on *Guerrant v. Anderson*, 4 Rand. (Va.) 208; *Guiteau v. Wisely*, 47 Ill. 433; *Pollard v. Cocke*, 19 Ala. 188; *Shepherd v. Burkhalter*, 13 Ga. 443; and the Tennessee cases, though not going so far as these. It is followed in *Linn v. Le Compte*, 47 Tex. 441, and applied in *Lewis v. Johnson*, 68 Tex. 448, 4 S. W. 644, to the assignment of land certificates lodged in the general land office, which is said not to be as good notice as recording in the county.

also an attaching creditor, if he had no notice at the time of levying his attachment, "express or implied, actual or presumptive"; so that here, at least, a creditor as such receives some substantial protection. The statute very wisely says that the unrecorded instrument is not valid "in law or in equity," and thus cuts off the contrivance by which the registry laws in other states have been frittered away.¹⁷⁵

Coming back to Ohio, we find that the sheriff's deed, if first recorded, has priority, though the creditor himself was the bidder. It is held that a purchaser at execution sale, who has paid the price, and is entitled to his deed, has, by reason of the publicity of his acquisition, and because his rights rest on record, as good a position as an ordinary purchaser holding a recorded deed, subject in all cases to notice. This is as to absolute deeds, while an unrecorded mortgage in Ohio is postponed to any lien which a creditor, or the creditors generally, may acquire with or without notice, in any way whatever.¹⁷⁶

In Missouri the statute, like those of the New England states, restricts the effect of the unrecorded deed to the parties and those having actual notice; but in the reported cases no regard is had for the rights of creditors as such. The law is read as if meant for the benefit of purchasers alone. In fact, creditors seem not to have invoked its aid. In Arkansas the statute seems in the most positive terms to put creditors with or without notice on the same plane as purchasers without notice, but the supreme court took the matter into its own hands, and struck all reference to creditors out of the law by charging the execution creditor with notice (actual or by possession) of the unrecorded deed, after the judgment lien had accrued, but before the execution sale.¹⁷⁷

¹⁷⁵ Emerson v. Ross' Ex'r, 17 Fla. 122; Carr v. Thomas, 18 Fla. 736; Thompson v. Maxwell, 16 Fla. 773.

¹⁷⁶ Scribner v. Lockwood, 9 Ohio, 184 (purchase as good as deed); Morris v. Daniels, 35 Ohio St. 406 (sheriff's deed proves value paid).

¹⁷⁷ See notes of Missouri cases to former sections. The Arkansas statute (section 671) says, "or against any creditors of the person executing such deed," etc., "obtaining a judgment or decree which by law may be a lien on said real estate, unless," etc. The opinion in Byers v. Engles, 16 Ark. 545, disregarding this clause, relies on McFall v. Seerrard, 1 Const. (S. C.) 296, under a statute almost as imperative, but now superseded (see above).

In Pennsylvania, which Kent in his Commentaries contrasts with New York, what he says about the equal rank of the judgment lien with a mortgage is not at all true as against an absolute deed. Such an instrument, though unrecorded, is never postponed to the younger lien of a judgment or attachment, though the creditor have no notice, and even though a confessed judgment has been taken as a security for a loan; and only after a struggle were purchasers under a sheriff's sale, holding the sheriff's recorded deed, allowed the rights of other purchasers.¹⁷⁸ But a mortgage, if unrecorded, must yield to the creditor's lien by judgment or attachment, if he had no notice when he acquired the lien; but against a creditor having then such notice, the mortgage prevails.¹⁷⁹

Upon the whole it is found that in many states no attempt for the protection of creditors has been made, and that in most of the others the statutory provision for them has been frittered away by judges unwilling to carry out a legislative demand not in harmony with their own notions of equity.

In Indiana the latest line of decisions is such that a creditor can never be aided by the registry laws. The sale under execution is always on a year's redemption. A recordable deed is given only after that time has expired. At any time before the execution and recording of the sheriff's deed an unrecorded deed may come to light, and defeat it. Hence it is unwise for a stranger to bid. It has been held, moreover, in the last cases, in conformity with the earliest authorities on the subject, but overruling several later decisions, that a creditor bidding at his own execution does not become a purchaser within the meaning of the registry laws; which is in accordance with that view of a purchaser which requires a present, rather than a past, consideration.¹⁸⁰

¹⁷⁸ Cadbury v. Duval, 5 Clark, 206: Morris v. Ziegler, 71 Pa. St. 450. But sheriff's deed prevails. Heister v. Fortner, 2 Bin. 40; Clark v. Campbell, 2 Rawle, 215; Stewart v. Freeman, 22 Pa. St. 120; Hultz v. Ackley, 63 Pa. St. 142.

¹⁷⁹ Uhler v. Hutchinson, 23 Pa. St. 110, overruling Solms v. McCulloch, 5 Pa. St. 473.

¹⁸⁰ Shirk v. Thomas, 121 Ind. 147, 22 N. E. 976; relying on Glidewell v. Spaugh, 26 Ind. 319 (this in turn on Keirsted v. Avery, 4 Paige, 9) and on Petry v. Ambrosher, 100 Ind. 510, 514; Wert v. Naylor, 93 Ind. 431,—overrules these cases: Rooker v. Rooker, 75 Ind. 571; Gifford v. Bennett, Id. 528;

Where one buying from a debtor has acquired an equity which is superior to, and must be protected against, the liens of creditors, the execution of a deed giving recognition to those equitable rights, which, without any fraud in the grantee, is not recorded, cannot put the grantee in a worse plight.¹⁸¹

§ 135. Defective Recording.

The law presumes that every recorded deed is lodged for record by the grantee, as the act is mainly for his benefit, and he alone would lose by the omission. When he has done so, and has paid the tax (if such is imposed upon the registration of deeds), and the fees due the officer, he has done all that it is in his power to do for giving the notice required by law to purchasers, or to these and creditors. But it may happen that, through accident, the deed is lost or destroyed before it is spread upon the record, or even entered upon the entry book; or that, through accident or the neglect of the officer, it is not entered, or not transcribed, or so defectively entered or transcribed as to mislead subsequent purchasers and creditors, or so as not on its face to appear as a lawfully recorded deed, and therefore not to amount to constructive notice to such purchasers or creditors. There may be great hardship to the second purchaser, who has laid out his money without anything to indicate to him the presence of the first deed; and an omission of the grantor's name from the index, the misspelling of that name in its first or second letter, or the omission of a short reference to the tract conveyed, where the grantor is a dealer in land, may make it wholly impracticable for a

Vitito v. Hamilton, 80 Ind. 137. A great number of other Indiana cases are quoted in support in that first named. The latest are *Hays v. Reger*, 102 Ind. 524, 1 N. E. 386; *Foltz v. Wert*, 103 Ind. 404, 2 N. E. 950; *Wright v. Tichener*, 104 Ind. 185, 3 N. E. 853; *Wright v. Jones*, 105 Ind. 17, 4 N. E. 281; *Taylor v. Duesterberg*, 109 Ind. 165, 9 N. E. 907. A number of cases from Nebraska, Illinois, California, Wisconsin, Alabama, Kansas, and North Carolina are also quoted, but none of them sustain the proposition that a creditor buying under his own execution can never overreach an unrecorded conveyance.

¹⁸¹ *Withers v. Carter*, 4 Grat. 407, where *Coleman v. Cocke*, 6 Rand. 618, 643, is claimed as authority, and the apparently contrary ruling in *McClure v. Thistle's Ex'rs*, 2 Grat. 182, is distinguished.

searcher to arrive at a knowledge of the instrument placed on record. Of course, there is no such hardship for the second purchaser where the misrecording is in a formal part, such as an omission of the certificate. But, without much reference to the equities in each case, the courts of the several states are irreconcilably divided in their conclusions.

Where the effect of the deed is made to depend by the statute on its being "lodged" or "deposited" or "filed" for record, it would follow that the grantee cannot be affected by the mistakes or neglect of the recorder. Where such effect is made to depend on its being recorded, he would, by a literal construction, be affected by any failure or defect. But the difference in the decisions does not run on the same line with this distinction in the words of the statute. It may be urged on behalf of the second grantee that the recorder, while guilty of neglect, though not the agent of the first grantee, was at least engaged on his business; and that when this grantee called for his deed, after it was transcribed, though he was not bound to look whether it had been properly indexed and correctly copied, he might at least have done so, if he chose.

The doctrine that the first grantee cannot suffer by any error of the officer is laid down thus in a late case in Connecticut: "The consequences of a mistake should not be visited on him. He has done all he could, and all the law required of him."¹⁸² The opposite position is taken by the supreme court of Iowa, justified, perhaps, by the wording of the local statute. In that state the registration has been deemed invalid as notice to subsequent purchasers where the index left out one of two tracts embraced in a mortgage, or where it gave a wrong description, and pointed to a wrong book and page, or where the deed is not entered on the index at all, or where the grantor's surname was misspelled in the index so as to give it another sound, or where the copy into the deed book differed substan-

¹⁸² Lewis v. Hinman, 56 Conn. 55, 13 Atl. 143. The mistake was in the transcription on the deed book. The court, among other grounds, takes this: that the entry on the entry book was certainly good, and protected the grantee, and he could not lose his rights by the subsequent event of the faulty transcribing. The Connecticut law says, "unless recorded." That the grantee is not prejudiced by delay had already been adjudged in Franklin v. Cannon, 1 Root, 500, and McDonald v. Leach, Kirby, 72.

tially from the deed actually executed. In all these cases in that state the record was held not to be notice as against subsequent purchasers.¹⁸³

In Kentucky and Virginia, where since the Virginia statute of 1785 the grantee has always been secured by lodging the deed for record, the former doctrine has always prevailed. Thus, where the grantor fraudulently withdrew the deed from the county clerk, or where it was lost in the office, the grantee was not made to suffer. He is to be "relieved against the mistakes of the clerk."¹⁸⁴ The Connecticut and Kentucky rule seems also to have been followed in Kansas and in Nebraska ("filing and paying the fees is all the grantee can do"). He will hold against subsequent purchasers; though the deed be lost by the register's neglect, and never recorded.¹⁸⁵ In Texas, it is indeed acknowledged that lodging for record is the equivalent of recording, as to the time from which priority is counted, and that where the records are destroyed by fire the grantees are not bound (in the absence of a statute to that effect) to restore the transcriptions of their deeds; but nevertheless, where a deed had been copied without the acknowledgment, which alone gave it the right to be placed on the books, the record was held to be in-

¹⁸³ Noyes v. Horr, 13 Iowa, 570; Breed v. Conley, 14 Iowa, 269 (where the index had wrong description); Scoles v. Wilsey, 11 Iowa, 261; Gwynn v. Turner, 18 Iowa, 1; Howe v. Thayer, 49 Iowa, 154 (Freeman indexed as Furman); Miller v. Bradford, 12 Iowa, 14. And see Switzer v. Knapps, 10 Iowa, 72, as to recording in wrong book. But the first grantee was not made to suffer by mistakes which made the record only technically defective. Jones v. Berkshire, 15 Iowa, 248 (deed by husband and wife in latter's right, indexed in name of husband only). But filing without indexing and recording not notice. Whalley v. Small, 25 Iowa, 184.

¹⁸⁴ Taylor v. McDonald, 2 Bibb (Ky.) 420; Bank of Kentucky v. Haggin, 1 A. K. Marsh. 306; Gill v. Fauntleroy, 5 B. Mon. 177; Breckenridges v. Todd, 3 T. B. Mon. 52; Lyne v. Bank of Kentucky, 5 J. J. Marsh. 545; Hiatt v. Calloway, 7 B. Mon. 178. Beverley v. Ellis, 1 Rand. (Va.) 102 (deed lost by clerk's neglect) has become the leading case on that side. It quotes Lord Mansfield's dictum in Douglass v. Yallop, 2 Burrows, 722, that the subsequent purchaser might sue the clerk, through whose neglect a judgment had not been enrolled.

¹⁸⁵ Lee v. Birmingham, 30 Kan. 312, 1 Pac. 73; Perkins v. Strong, 22 Neb. 725, 36 N. W. 292; Deming v. Miles, 35 Neb. 739, 53 N. W. 665 (deed burnt at recorder's office).

effectual, and no notice to a subsequent purchaser.¹⁸⁶ This view is supported by authorities from New York, Vermont, Ohio, Missouri, Maryland, California, and Tennessee. In New York, however, the entry on the index is not considered as part of the registry, and its omission does not destroy the effect as notice; with this qualification placed upon it in Vermont, and which probably would be recognized elsewhere, that the mere delay of the recording officer does not prejudice the grantee, for the original in his hands is notice till the copy is made.¹⁸⁷ Wisconsin seems to recognize the Iowa doctrine to the full, but seeks to soften its harshness by allowing defects in the transcript or in the index to be cured one by the other as long as the entry in the index is such as to lead a searcher into the right line of inquiry.¹⁸⁸

¹⁸⁶ Copelin v. Shuler (Tex. Sup.) 6 S. W. 668. As to lost records, see Evans v. Templeton, 69 Tex. 843, 6 S. W. 843; Salmon v. Huff, 80 Tex. 133, 15 S. W. 257, 1047. See statute as replacing, Rev. St. art. 4292. Barcus v. Brigham, 84 Tex. 538, 19 S. W. 703; Magee v. Merriman, 85 Tex. 105, 19 S. W. 1002. Where the record does not appear, it is presumed to be correctly made. Taylor v. Harrison, 47 Tex. 454. Article 4292 Rev. St., requiring fresh recording of destroyed records, enforced in Barcus v. Brigham, 84 Tex. 538, 19 S. W. 703.

¹⁸⁷ Beekman v. Frost, 18 Johns. 543 (mortgage for \$3,000 registered as for \$300); Terrell v. Andrew Co., 44 Mo. 301 (mortgage registered for \$200 instead of \$400)—in both cases notice only for smaller sum; Sawyer v. Adams, 8 Vt. 172 (with a strong dissent); Sanger v. Craigue, 10 Vt. 555; Brydon v. Campbell, 40 Md. 331 (deed of a four-tenths interest recorded as of one-fourteenth, and notice as to that only); Jennings v. Wood, 20 Ohio, 261 (a hard case, where the given name "Lemuel" was written "Samuel," and no man of the latter name was known. There is a strong dissent by Spalding, J., relying mainly on Manwell v. Manwell, 14 Vt. 14, on Greenleaf's note to Cruise on Real Property, vol. 2, p. 546; Piatt v. St. Clair, Wright (Ohio) 529; and Leiby v. Wolf, 10 Ohio, 84,—and maintaining that where the grantee gets his deed back from the recorder with the indorsement "Recorded," he may in law rely upon that return). And in Ohio a misleading entry upon the index also annuls the registry as notice. Green v. Garrington, 16 Ohio St. 548. Not so in New York. Mutual Life Ins. Co. v. Dake, 87 N. Y. 257. Part of description left out by recorder, afterwards interlined, notice only from that time. Chamberlain v. Bell, 7 Cal. 292; Lally v. Holland, 1 Swan (Tenn.) 396; Baldwin v. Marshall, 2 Humph. (Tenn.) 116. The early Georgia case of Shepherd v. Burkhalter, 13 Ga. 443, seems to be overruled. See *infra*. On delayed recording, see Bigelow v. Topliff, 25 Vt. 275.

¹⁸⁸ Pringle v. Dunn, 37 Wis. 449; Oconto Co. v. Jerrard, 46 Wis. 317, 50 N.

The doctrine as laid down by Judge Cooley for Michigan rests on the ground that for the grantee to leave the deed with the register, and for the latter to put it on the entry book, are the main elements of registry, and that the benefit of the notice thus gained cannot be lost by any mistake made thereafter in transcribing or indexing; and the like result has been reached in Mississippi on like grounds.¹⁸⁹ And this doctrine, which favors the first grantee, seems to prevail to its full extent in Illinois, in Alabama, in Rhode Island,¹⁹⁰ and, at least so far that the first grantee is not prejudiced by the failure to index his deed, in New Hampshire and in Vermont, and, as seen above, in New York, also in Missouri,—though in both of these states an omission in the transcript of the deed is fatal to its grantee,—while in Georgia the failure to index a deed has been excused on the double ground that the registry is complete without the index and because the grantee has done all that the law requires by lodging his deed for record;¹⁹¹ and in North Carolina the “pro-

W. 591 (but an error of description in the record may be rectified by the index; *Shove v. Larsen*, 22 Wis. 142). *St. Croix Land & Lumber Co. v. Ritchie*, 78 Wis. 492, 47 N. W. 657. An index entry, made after purchase by second grantee, is too late, *Hay v. Hill*, 24 Wis. 235; and without the entry there is no registry, *Lombard v. Culbertson*, 59 Wis. 437, 18 N. W. 399. A mistake in copying that does not mislead overlooked. *Land & River Imp. Co. v. Bardon*, 45 Fed. 706.

¹⁸⁹ *Sinclair v. Slawson*, 44 Mich. 123, 6 N. W. 207. Authorities from states in which the grantee is cleared of all responsibility for the recorder's mistake or neglect are quoted: *Barnard v. Campau*, 29 Mich. 162 (seems to be mistake in original deed). *Mangold v. Barlow*, 61 Miss. 593, reviewing the position of other states: "He [the grantor] is not a guarantor of compliance by the recording officer with the law as to recording. * * * The state has undertaken to have the recording done, and, if one suffers from the negligence of the officer, he must seek redress from the officer." The deed is under the statute void against creditors, etc., unless it "be acknowledged * * * and lodged with the clerk." It was a case of misleading misdescription.

¹⁹⁰ *Merrick v. Wallace*, 19 Ill. 486; *Curtis v. Root*, 28 Ill. 367; *Gillespie v. Reed*, 3 McLean, 377, Fed. Cas. No. 5,436 (acknowledgment did not appear); *Polk v. Cosgrove*, 4 Biss. 437, Fed. Cas. No. 11,248; *Riggs v. Boylan*, 4 Biss. 445, Fed. Cas. No. 11,822; *Mims v. Mims*, 35 Ala. 23; *Dubose v. Young*, 10 Ala. 368.

¹⁹¹ *Nichols v. Reynolds*, 1 R. I. 30; *Chase v. Bennett*, 58 N. H. 428; *Curtis v. Lyman*, 24 Vt. 338; *Bishop v. Schneider*, 46 Mo. 472; *Chatham v. Bradford*, 50 Ga. 327.

bate" made in the superior court is notice, should the clerk of that court refuse to hand the deed over to the register.¹⁹² In Illinois, the great Chicago fire, which destroyed the record books of Cook county, gave rise to a great deal of litigation; and it was held uniformly, upon precedents already established, that the notice of the deed, when once given to the world, is not lost either by the "marring" of the index or by the destruction of the deed book.¹⁹³

The opposite view has been declared, or at least intimated, by the courts of Pennsylvania, where it was held that the failure to index a mortgage, or transcribing it only in a record book of the wrong class, defeats the effect of the registry.¹⁹⁴ In Arkansas, the act of lodging a deed for record is not held equivalent to recording; but a number of curative laws, most of them retrospective, leave very little chance for a grantee to lose the protection of his estate by defective recording. In Washington, also, "lodging" is held not equivalent to recording.¹⁹⁵

Where the neglect of the recorder in making perfect entries and

¹⁹² *Ridley v. McGehee*, 2 Dev. 40; *McLindon v. Winfree*, 3 Dev. 262 (the order of probate need not be transcribed into the deed book).

¹⁹³ *Alvis v. Morrison*, 63 Ill. 181 (from Logan county); *Gammon v. Hodges*, 73 Ill. 140; *Heaton v. Prather*, 84 Ill. 330; *Curyea v. Berry*, 84 Ill. 600; *Steele v. Boone*, 75 Ill. 457 (from Cook county); *Dodd v. Doty*, 98 Ill. 393 (index illegible); *Shannon v. Hall*, 72 Ill. 354. In Georgia, also, the notice once gained by the record is not lost by its destruction. *Denham v. Holeman*, 26 Ga. 182.

¹⁹⁴ *Speer v. Evans*, 47 Pa. St. 141; *Luch's Appeal*, 44 Pa. St. 519. Both decisions seem to be regretted in *Schell v. Stein*, 76 Pa. St. 398, which only decides that the law requires no general index. The Pennsylvania law contemplates that the recorder makes the search and is responsible to the subsequent purchaser for mistakes, and it would follow logically that the first grantee cannot suffer by his neglect. Hence the validity of the recording depends somewhat on the recorder's ability to find the deed on a search, and the notice of a registered (absolute) deed is not lost by its transcription in the mortgage book. *Clader v. Thomas*, 89 Pa. St. 343.

¹⁹⁵ Arkansas, Dig. §§ 673-684. See *Scott v. Doe*, 1 Hempst. 275, Fed. Cas. No. 12,528a, as to difference between lodging for record and recording. In *Ritchie v. Griffiths*, 1 Wash. St. 429, 25 Pac. 341, it is shown that all the directions of the registry act from first to last are of equal importance, with reliance on Judge Dillon's opinion to like effect in *Barney v. McCarty*, 15 Iowa, 510.

an exact copy is held to avoid the registry, subsequent purchasers have naturally sought to carry the matter to an extreme. Hence, the courts have been compelled to draw a line at such nicety as declaring the registry void because some little word, like "is" or "said," was left out, or because the word "Seal" was substituted for a wafer seal, or the legend on a notarial seal was not transcribed.¹⁹⁶ The register may correct his registration by comparison with the original; and the entry or copy so corrected will be constructive notice, at least from the time when it is so perfected.¹⁹⁷ In Florida, while the statute required the deed of a married woman to be "acknowledged and recorded," such a deed, having been acknowledged in due form and lodged for record, while in the clerk's office, by his neglect, or by some accident, was destroyed by fire, and thus was never actually recorded. It was held that the feme's title passed nevertheless.¹⁹⁸

§ 136. The Registry as Proof.

Though this work does not deal generally with rules of evidence, we must refer to the law determining when the record of a deed may be used to prove its contents and execution; for it happens often that, after the lapse of time and loss of original papers, a title to land depends on this proof alone.

The law may be stated thus: To make the registry proof, the following circumstances must concur: First, the instrument must

¹⁹⁶ St. Croix Land & Lumber Co. v. Ritchie, 78 Wis. 492, 47 N. W. 657; German-American Bank v. White, 38 Minn. 471, 38 N. W. 361 (notarial seal not copied; aided by an act of 1885); Griffin v. Sheffield, 38 Miss. 389; Hughes v. Debnam, 8 Jones (N. C.) 127 (it seems, though, that in this state no neglect could affect the grantee); Huston v. Seeley, 27 Iowa, 183 (initials transposed); Barney v. Little, 15 Iowa, 527 (mistake in index as to page of deed immaterial); Bedford v. Tupper, 30 Hun, 174.

¹⁹⁷ Baldwin v. Marshall, 2 Humph. (Tenn.) 116. An error which cannot mislead is not available as want of notice. Gaskill v. Badge, 3 Lea (Tenn.) 144.

¹⁹⁸ Christy v. Burch, 25 Fla. 942, 2 South. 258; distinguished from the Kentucky case of Scarborough v. Watkins, 9 B. Mon. 540, under the law of that state before December, 1873.

be one which, under the law in force at the time of recording, was fit to be recorded, unless the record has been thereafter declared evidence by some curative act. Second, it must bear on its face the evidence that it was admitted to record upon a proper certificate of acknowledgment, or upon such proof by witnesses as the law at the time of the recording demanded. Third, it must be entered in the proper county or recording district, i. e. in that in which the land to be affected by the instrument is situated; but it may be, under the law of a few states, referred to in a former section, in the office of the county or district in which some part of the land lies. Lastly, it must be recorded in a book of the set proper for instruments of the kind. This last rule is somewhat doubtful, both in reason and authority.

It is not within our purpose to discuss, where the record is primary proof, as in Maine, New York, New Jersey, Pennsylvania, etc., and where it can only be introduced when the original deed is lost or beyond the reach of those claiming under it, as in Illinois, Iowa, Missouri, etc., whether it is conclusive as to the execution or contents of the instrument, or whether it may be rebutted by parol proof. These questions belong rather to a treatise on Evidence. The admissibility of parol evidence to contradict the certificate of acknowledgment has been discussed in connection with the deeds of married women.

Under the first rule, the record of a title bond has been rejected as proof of its execution, where conveyances alone are recordable.¹⁹⁹

Not to allow the record of an ill-proved or ill-acknowledged deed to work a notice on purchasers and creditors is highly technical. Not to admit it in evidence is quite natural; for the trial court cannot stop anywhere between such proof by acknowledgment or witnesses as the law requires and no proof at all, i. e. between a well-recorded deed and a notorious forgery.²⁰⁰

¹⁹⁹ Beverly v. Burke, 9 Ga. 440. And see section 127, note 21, as to rejection of second mortgage under old Kentucky law. See Sechrist v. Baskin, 7 Watts & S. 403, as to sheriff's deed.

²⁰⁰ Westerman v. Foster, 57 Ind. 408; Tindal v. Watson, 24 Ga. 494. The impression of the certifying officer's seal need not appear in the transcript, where sealing is recited. Griffin v. Sheffield, 38 Miss. 359.

In North Carolina, where the main object of recording, until 1885, was to preserve proof of the deed, much difficulty arose from the illiteracy of witnesses on whose attestation the "probate" of the will was granted. The act of the probate judge formerly, now the clerk of the superior court, admitting the deed to probate, and handing it over to the register to enter and transcribe upon his books, may be judicial; but this judicial power is narrowly restricted, and, if he admits the deed upon less or slighter evidence than the statute prescribes, the "probate" is void, and the transcript is not evidence.²⁰¹ It was held in Maryland (and the ruling may be applicable in many other states) that, though the recording acts did not in so many words require the certificate of acknowledgment (except as to married women) to be transcribed, yet the practice had always been to transcribe it with the deed, and the omission of any acknowledgment on the record left it without any force as proof of the deed.²⁰²

As to the record being in the proper county, the states are not alike rigid. If an instrument refers to land in several counties, it may be lawfully recorded in any of them; but it may, under the local law, not affect purchasers of the parts or tracts lying in the other counties. It has been held in Michigan that, the record being lawfully made in one county is evidence of the deed, generally, and may be read in support of title under it to land in other places; while the opposite view was taken in Missouri.²⁰³ But, at any rate, the admissibility of the record as evidence depends on its being made in the proper office; though the courts will show some indulgence, in hard cases, in determining what is the right and proper place.²⁰⁴

²⁰¹ The Code, §§ 1245-1260, regulates "probate" of deeds. *Love v. Harbin*, 84 N. C. 249 (certificate of probate held good), relying on *Hogan v. Strayhorn*, 65 N. C. 279; *Black v. Justice*, 86 N. C. 504. See the change of jurisdiction discussed in *Dugger v. McKesson*, 100 N. C. 1, 6 S. E. 746.

²⁰² *Budd v. Brooke*, 3 Gill, 198. The deed had been made in 1684; the acknowledgment was prescribed by a colonial act of 1674.

²⁰³ *Welt v. Cutler*, 38 Mich. 189 (proof); *Muldrow v. Robinson*, 58 Mo. 331 (not proof).

²⁰⁴ *Hill v. Sanders*, 4 Rich. Law (S. C.) 521. A deed being executed before a new county was organized, its registry at the state capitol under the old law was sustained.

The several books in the recorder's office are only proof of those matters which, under the law, they must contain. Thus the entry book in Indiana has been held not to be proof of the description of the land conveyed.²⁰⁵

The statutes as to acknowledgment and proof differ on one great point: Some of them require (and in very clear words) the identification of the grantor (by the certifying officer in the case of acknowledgment, by the attesting witness when the deed is "proved"); while in other states the officer simply certifies, or the witnesses state, that N.N., the within grantor, appeared, and signed or acknowledged the deed, without saying anything about their acquaintance with him.²⁰⁶

In New York, and in all of the Western states and territories which have followed more or less in its footsteps in their laws of property, so also in the District of Columbia, the officer who certifies the signature or acknowledgment of the grantors must state expressly that they are known to him, or that they are "well known," "personally known," or "personally well known"; in New Jersey, that he is "satisfied that they are such"; in Tennessee, that he is "personally acquainted" with the grantor. Where the officer cannot thus certify, he must state what witness proved to him the identity of the grantor, and generally take the signature of the witness to the identifying oath. But in the New England states, in Pennsylvania, Ohio, and Indiana, in Maryland, the Virginias, and Kentucky, in the Carolinas, Georgia, and Mississippi, no express words indicating acquaintance with the grantor are required.²⁰⁷

In states where the genuineness of a deed is not supposed to be

²⁰⁵ Gilchrist v. Gough, 63 Ind. 576.

²⁰⁶ Many of the former have been given in the chapter on "Title by Grant" in the sections on "Other Requisites" and that on "Privy Examination." The former are changed so often, and the words of identification are omitted or reinserted, sometimes, it seems, without any clear purpose, that the statute in force at the time when the deed is registered should be always carefully consulted. See, also, some instances given in section 127 of this chapter of acknowledgments not justifying registration.

²⁰⁷ In South Carolina, deeds of grantors other than married women are not acknowledged, but always proved on the oath of witnesses. But the form for the married woman contains no words of identification.

established without words indicating the certifying officer's knowledge, it naturally follows that a defect on this score must exclude the registration of a deed made upon an acknowledgment lacking these all-important words; though the courts have not been very strict in insisting on the very words of the statute, as long as the officer seemed to be willing to vouch for the grantor's identity, and to be conscious that he was doing so.²⁰⁸

²⁰⁸ Hayden v. Moffatt, 74 Tex. 647, 20 S. W. 820, where the record was, however, rejected on another defect. And the conveyance laws of some states recognize any acknowledgment of a deed which is made and certified according to the laws of the place where it is taken,—e. g. Wisconsin. Hence an acknowledgment certified to in Kentucky, without words identifying the grantor on a deed conveying lands in Wisconsin, is good there; and the registry of the deed on such certificate, being lawful, is good evidence of the execution and contents.

(1014)

CHAPTER XII.

ESTOPPEL AND ELECTION.

- § 137. Estoppel by Deed.
- 138. Estoppel in Pais.
- 139. Election under Will or Deed.
- 140. Between Will and Dower.
- 141. Other Elections by Widows.
- 142. How Election is Made.

§ 137. Estoppel by Deed.

Having in a former part of this work treated of the transfer of future or after-acquired estates by the estoppel of warranty, or of the grant and its implied recital of power to convey, we must here state further cases of estoppel by deed, not only upon those who grant or covenant therein, but also upon those who derive any interest from it, directly or indirectly. All these are estopped by the recitals of the deed from making any claim inconsistent with the facts therein stated,¹ though they are not bound by conclusions of law shown to be incorrect by the facts stated.² Recitals as to the origin of the title have been held good as estoppels, though referring dis-

¹ The notes to the *Duchess of Kingston's Case* and *Christmas v. Oliver*, in the second volume of Smith's *Leading Cases* (page 603), are the best storehouse of authorities on this subject. See, especially, *Bank of U. S. v. Benning*, 4 Cranch, C. C. 81, Fed. Cas. No. 908 (recitals as to chain of title); *Byrne v. Morehouse*, 22 Ill. 603 (no one claiming under deed even remotely can deny recital though untrue); *Chautauqua Co. Bank v. Risley*, 4 Denio, 480 (remote grantee bound); *Ross v. Durham*, 4 Dev. & B. (N. C.) 54 (agreement under seal between two landholders as to their interest in lands); *Coogler v. Rogers*, 25 Fla. 853, 7 South. 397 (when A. is estopped A.'s grantee is also); or more generally, whenever a party is bound, so are his privies "privies in blood (i. e. heirs), privies in estate, privies in law"; *Ellen v. Ellen*, 18 S. C. 493, quoting *Phil. Ev.*

² *Griffith v. Sebastian Co.*, 49 Ark. 24, 3 S. W. 886 (mistake of law as to which is the county seat). On similar principles, the recital of a decree void for lack of jurisdiction does not estop. *Bowser v. Williams*, 6 Tex. Civ. App. 197, 25 S. W. 453.

tinctly to another will or deed on public record.³ The grantee being thus bound by a deed he has not signed, it becomes important to determine whether he has accepted it. Paying all or a part of the purchase money, or executing a note or mortgage therefor, is clearly an acceptance.⁴ An instructive illustration of this estoppel by deed is that of a conveyance made to a man and a woman, described therein as husband and wife, in a state where such a conveyance creates an estate by entireties. The heirs of one cannot claim against the purchasers from the survivor setting up the fact that the two grantees were not lawfully married.⁵

The recitals of a deed cannot be used for the purpose of disproving fraud or duress, which it is alleged was used against one of the parties to it, to bring about either its execution or its acceptance; for otherwise fraud and force might render themselves invincible by simply inserting a few additional words in a writing conceived in wrong.⁶ Hence, if a deed is attacked for inadequacy of consideration, or for the lack of any consideration, the sum recited as having been paid may always be controverted; not only by creditors of the grantor seeking to set such deed aside as a fraudulent conveyance,⁷ but even by the grantor himself, claiming to have been overreached, or to have been subjected to duress.⁸ How far, in the former case,

³ Stone v. Fitts, 38 S. C. 393, 17 S. E. 136. However, no attempt was made here to show the devise recited in the deed under which defendant claimed was different from the recital therein. Quaere, whether the will would not have been admitted to contradict it. Lindauer v. Younglove, 47 Minn. 62, 49 N. W. 384 (an entry by mortgage on record that his only mortgage is satisfied estops him against a subsequent purchaser).

⁴ Comstock v. Smith, 26 Mich. 306.

⁵ Jacobs v. Miller, 50 Mich. 119, 15 N. W. 42 (quaere, would the deed create an estoppel between the two grantees, or one of them and the grantees of the other, when no rights have arisen from a purchase in good faith? Similar is Trout v. Rumble, 82 Mich. 202, 46 N. W. 367, where an ill-divorced husband mortgaged his homestead.

⁶ Hickman v. Stewart, 69 Tex. 255, 5 S. W. 833; Burroughs v. Pacific Guano Co., 81 Ala. 255, 1 South. 212 (not a conveyance).

⁷ Whitaker v. Garnett, 3 Bush (Ky.) 402, 413, lays down a distinction regarding the burden of proof, as to the untruth of the alleged consideration. When the creditor attacks a deed as voluntary, it is enough for our purpose that the creditor is not estopped.

⁸ Union Mut. Life Ins. Co. v. Kirchhoff, 133 Ill. 368, 27 N. E. 91; Day v. Davis, 64 Miss. 258, 8 South. 203.

the consideration stated is *prima facie* proof, is a matter to be discussed in books on evidence.⁹ It is of course to be assumed as the true consideration between the parties until the contrary appears.

Still more, where a deed is void upon its face for want of capacity in the grantor to convey,—e. g. when the grantor is not *sui juris*, or an Indian landowner, who, under the terms of the land patent, can only convey with official consent,—neither grantor nor grantee is estopped by the deed or its recitals.¹⁰ And where the recitals of a deed show a state of facts, and draw from them an erroneous conclusion of law, the parties are not estopped by such conclusion.¹¹ The whole deed must be taken together in all its parts, and thus there may often arise “an estoppel against an estoppel,” which lets in the truth.¹²

Generally a deed works an estoppel only as to the property (i. e. the land, and the estate therein) which it conveys. Thus the description of the premises as having a certain width, and then binding on the grantor's lot, or the sale of a tract except a named lot “heretofore sold to B,” has been held not to estop the grantee from claiming the land thus impliedly admitted as remaining with the grantor or belonging to a third person;¹³ and it is stated on the highest authority that “facts recited in an instrument may be controverted by the other party in an action which is not founded on the same instrument, but is wholly collateral to it.”¹⁴ In one class of cases an estoppel by

⁹ In discussing the rights of a subsequent purchaser under the registry laws against an older unrecorded deed, authorities were cited as to the burden of proving the consideration paid.

¹⁰ *Bank of America v. Banks*, 101 U. S. 240, 247 (not a land case). “To work an estoppel, parties to a deed must be *sui juris* competent to make it effectual as a contract.” Citing *Jackson v. Vanderheyden*, 17 Johns. 167.

¹¹ *Duncan v. Navassa Phosphate Co.*, 137 U. S. 647, 11 Sup. Ct. 242, grantee of a mere license is not, by deed in the usual form, estopped to deny the grant of an inheritance when sued for dower.

¹² *Orthwein v. Thomas* (Ill.) 13 N. E. 564.

¹³ *Bank of America v. Banks*, *supra*; *Bingham v. City of Walla Walla* (Wash.) 13 Pac. 408; *O'Brien v. Bugbee*, 46 Kan. 1, 26 Pac. 428.

¹⁴ *Ambs v. Chicago, St. P., M. & O. Ry. Co.*, 44 Minn. 266, 46 N. W. 321; citing *Blackhall v. Gibson*, 2 L. R. Ir. 29; *Carpenter v. Buller*, 8 Mees. & W. 209; *Southeastern R. Co. v. Warton*, 6 Hurl & N. 520; *Great Falls Co. v. Worster*, 15 N. H. 412, 450; *Ingersoll v. Truebody*, 40 Cal. 603; *Baldwin v. Thompson*, 15 Iowa, 504; *Reed v. McCourt*, 41 N. Y. 435, where it was said that

deed is enforced against the grantee in a deed in favor of parties who would not be bound reciprocally by the same deed, not being parties or privies to it. Where one buys land, or takes a mortgage upon it, and the deed conveying or pledging it to him recites a senior mortgage, or some other superior lien, the grantee or mortgagee cannot deny that at the time of the deed to him such superior lien subsisted with such force and to such an extent as the recital indicates; and where one actually buys the land, and takes an absolute deed, such estoppel is highly just, for the superior lien must have been taken into account in the purchase price; and, even if it were void on any ground, the purchaser should not be profited thereby.¹⁵ This case arises often when a man purchases land at execution or chancery sale subject to a prior mortgage. If he wishes to assail such mortgage for fraud he must not buy subject to it; least of all take a sheriff's deed reciting a sale subject thereto.¹⁶ The estoppel cannot be avoided by granting or accepting a deed in some particular character, such as in the position of trustee for some named purpose. A party conveying land as trustee is estopped thereafter from claiming it as his own. In fact, the character in which he grants or which he appends to his signature, is in itself a recital incompatible with the claim in his own right.¹⁷ And one who accepts a grant for the

to make it conclusive would verify the remark that estoppels are odious. But in all such cases the recital might be *prima facie* proof against the parties to the instrument. See, also, *Lowell v. Daniels*, 2 Gray (Mass.) 161. Where the plaintiff claims under a grant from the defendant by him personally or through the sheriff he cannot set up an outstanding title. *Million v. Riley*, 1 Dana (Ky.) 363.

¹⁵ *Clapp v. Halliday*, 46 Ark. 258, 2 S. W. 853. And so the purchase under the mortgage. *Sherwood v. Alvis*, 83 Ala. 115, 3 South. 307; *Pratt v. Nixon*, 91 Ala. 192, 8 South. 751 (though first mortgage is to an unauthorized foreign corporation). But it was held in *Brooks v. Owen*, 112 Mo. 251, 19 S. W. 723, and 20 S. W. 492, that a mere recital in a deed that it is subject to an incumbrance, when it does not appear that it was deducted from the price, does not estop the grantee from attacking it for want of consideration. And buying in general terms subject to a mortgage does not estop the grantee from showing that less than the face is due. *Lewis v. Noble*, 93 Mich. 345, 53 N. W. 396.

¹⁶ *Central Nat. Bank v. Hazard*, 30 Fed. 484 (purchase of railroad subject to receiver's certificates).

¹⁷ *Bobb v. Bobb*, 99 Mo. 598, 12 S. W. 893, where the plaintiff, holding land (1018)

use of or in trust for others is estopped from claiming the premises granted in his own right.¹⁸ A most familiar application of estoppel by deed is this: That where, in a dispute about land, both parties claim by grant from a common source,—that is, have accepted deeds from the same prior holder of the title,—neither of them can deny such ownership in that holder as the deed from him implies. Thus the defendant in such cases is not allowed to show a better outstanding title in a third person.¹⁹ And if A's creditors assail his deed to B as fraudulent and collusive, or if A himself seeks to set it aside as obtained by fraud from him, it does not lie in B's mouth to show that the land conveyed to him did not belong to A at all.²⁰

An important departure was made in a recent case before the supreme court of Indiana. Under an execution against a married man a lot was sold, and by the bidder conveyed to one already in possession, and who could trace her title back to an undoubted prior owner. After the execution debtor's death, the widow claimed her thirds, and insisted that the grantees under the sheriff's deed were estopped from denying the defendant's title. The court distinguished the case, partly because possession had not been taken under the sheriff's sale, partly because, at the trial, those claiming against the widow relied only on their original title, and not on the sheriff's deed. No authorities are quoted in support of the judgment, but it seems just that the lawful owner of land should

in trust for his debtor, conveyed it as trustee at the debtor's request, he was not allowed to attack the conveyance by creditor's bill in his own right. *Neyland v. Bendy*, 69 Tex. 711, 7 S. W. 497; *Hull v. Glover*, 126 Ill. 122, 18 N. E. 198; *Swann v. Wright's Ex'rs*, 110 U. S. 490, 4 Sup. Ct. 235.

¹⁸ *Dawson v. Mayall*, 45 Minn. 408, 48 N. W. 12.

¹⁹ *Doyle v. Wade*, 23 Fla. 90, 1 South. 516; *Schwallback v. Chicago, M. & St. P. Ry. Co.*, 69 Wis. 292, 34 N. W. 128; *Evans v. Foster*, 79 Tex. 48, 15 S. W. 170; *Sullivan v. McLaughlin*, 99 Ala. 60, 11 South. 447. A squatter on land who buys a title from A. to justify his possession cannot gainsay it while he holds the possession. *Bodley v. McChord*, 4 J. J. Marsh. 475; *Blight's Lessee v. Rochester*, 7 Wheat. 535; *Ames v. Beckley*, 48 Vt. 395 (a fortiori, where the title is derived from the adverse party); *Coleman v. McCormick*, 37 Minn. 179, 33 N. W. 556; *Mickey v. Stratton*, 5 Sawy. 475, Fed. Cas. No. 9,530; *Horning v. Sweet*, 27 Minn. 277, 6 N. W. 782.

²⁰ *Fisher v. Moog*, 39 Fed. 665; *Gruber v. Baker*, 20 Nev. 453, 23 Pac. 858; *Workman v. Harold (Ky.)* 2 S. W. 679.

not be put into a worse plight by buying in a doubtful title for his better security.²¹

A mortgagor cannot, in a suit of foreclosure, or in an ejectment by a purchaser under the power of sale, set up his own want of title as a defense; neither can those who claim under him;²² and when one executes a mortgage to a corporation he cannot deny its capacity to receive it, not even when it is a foreign corporation, which is forbidden by statute to do business in the state, unless the statute should go further, and expressly declare mortgages thus made null and void.²³

In this connection we may speak of the confirmation of void legal proceedings, under which a party's land has been sold, by his receiving the proceeds, or that part which remains after payment of debts, with knowledge of the price received. Generally a written receipt is given upon such occasions, but it is seldom worded with full enough reference to the land sold to satisfy the statute of frauds. The estoppel, therefore, is not strictly "by deed," but rather by matter in pais, which will be discussed in the next section.²⁴ In like manner, the rule forbidding a tenant from assailing the title of his landlord, which was formerly referred to the binding effect of the lease under seal, is now, as will be shown, placed on the ground of facts in pais,—his deriving the possession from

²¹ Shockley v. Starr, 119 Ind. 172, 21 N. E. 473; s. p., Henderson v. Bonar (Ky.) 11 S. W. 809; Dashiel v. Collier, 4 J. J. Marsh. 601. Gayle v. Price, 5 Rich. (S. C.) 525, put the distinction between having and not having previous title arguendo. In Stevenson v. McReary, 12 Smedes & M. (Miss.) 9, the acceptance of a deed in which dower is excepted from warranty, no estoppel against denying widow's right. See, also, Holmes v. Spinning, Cin. Law Bul. 297. In Kimball v. Kimball, 2 Greenl. (Me.) 226, the "tenant" in dower was estopped from showing that the demandant's late husband had received his deed only in fraud of creditors.

²² Carson v. Cochran, 52 Minn. 67, 53 N. W. 1130.

²³ Reinhard v. Virginia Lead Min. Co., 107 Mo. 616, 18 S. W. 17, based mainly on National Bank v. Matthews, 98 U. S. 621, where a national bank, notwithstanding the prohibition on these banks against discounting real-estate paper, was allowed to recover on a mortgage note which it had discounted.

²⁴ (We have seen that in some states a sale by an administrator or guardian is cured of many defects, if proceeds have been properly applied). Bumb v. Gard, 107 Ind. 575, 8 N. E. 713.

the landlord.²⁵ A buyer of land by executory contract who, though in equity the owner, is at law only a tenant at will, has been held down to the same rule, that he cannot deny the title of his vendor, nor buy one hostile to his, before he gives up the possession gained under his contract.²⁶

We will show in the chapter on "Judgment," that privies in blood, estate, or representation, are as much bound by a record as the parties to it. We find that they are also bound, when there is an estoppel by deed, along with him from whom their rights are derived; and we shall find the same incident to every other estoppel. In short, the matter in estoppel which prevents any one from claiming an estate in land attaches itself to that estate like an incumbrance, and pursues it into the hands of heirs, devisees, representatives, and of all assigns whose right arises subsequent to the matter of estoppel; while it inures also to the heirs and assigns of him who is entitled to take advantage thereof.²⁷

§ 138. Estoppel in Pais.

Besides estoppel by record, that is, by the judgment of a court, which prevents all parties, and privies, and all purchasers pending the suit, from claiming the land involved in the suit, otherwise than in conformity therewith, and besides estoppel by deed, which has been treated in part in a section on "After-acquired Property," and partly in the first section of this chapter, there is a third kind or method of estoppel, through which an estate or interest in land may become lost to its owner, which has attained wide proportions only since the middle of the nineteenth century, known as "equitable estoppel," or as "estoppel in pais." The subject has become so large that only a very short abstract, and a very small part of the authorities, can here be given. We shall first speak of "estoppel

²⁵ See next section, towards its end.

²⁶ *Brock v. Hidy*, 13 Ohio St. 306; *King v. Ruckman*, 20 N. J. Eq. 316; *Frink v. Thomas*, 20 Or. 265, 25 Pac. 717.

²⁷ *Carver v. Jackson*, 4 Pet. 1; *Crane v. Morris' Lessee*, 6 Pet. 598; and other cases, many of which are cited in Herman on Estoppel (section 606), to the position, which is elementary and undisputed, that estoppel works against privies by blood, law, or estate.

by conduct"; afterwards, and much more shortly, of estoppel by subsequent ratification or acquiescence.

It will be shown that the ground for estoppel by conduct is in its nature a tort; or, at least, that the owner's action in claiming his estate, interest, or lien would, by relation back, become a tort, if his former representation, or the state of title indicated by his conduct, should not come true; although a promise by the owner not to set up his title would be unenforceable, either for the want of a consideration connecting itself with the promise, or more generally because not in writing, and therefore not operative under the statute of frauds.²⁸ It will be seen, in comparing the au-

²⁸ Bigelow, in his work on Estoppel (chapter 14), defines estoppel, by matter in pais, as "an indisputable admission, arising from the circumstance that the party claiming the benefit of it has, in good faith on his part, been induced, by the voluntary intelligent action of the party against whom it is alleged, to change his position." And he adds, to lay the groundwork for a division: "The parties may have been equally innocent in effecting this change of position, or they may not have been equally innocent." He treats "Estoppel by Conduct" in his chapter 20 quite at length, and election between inconsistent positions as one of the branches of estoppel in pais. The law of estoppel by conduct is of such recent growth that *Pickard v. Sears* (1837) 6 Adol. & E. 469, is quoted by him as the leading case. It involves the title to chattels only. But there are Kentucky cases as early as 1807 and 1812 (*Craig v. Baker*, Hardin, 289, and *Gerault v. Anderson*, 2 Bibb, 543) recognizing the effect of estoppel by conduct on interests in land; and, as early as 1815, Chancellor Kent, in *Wendell v. Van Rensselaer*, 1 Johns. Ch. 344, 354, would not allow a defendant who secretly held a conveyance to a tract of land to set it up, after he had for 14 years seen the plaintiff and others take possession of lots in the tract and erect costly buildings upon them, using the words: "Qui tacet, consentire videtur; qui potest et debet vetare, jubet" (he who can and should forbid, bids);—and quoting cases as far back as *Hunsden v. Cheyney*, 2 Vern. 150; though in none of these does the owner of an interest in land lose it by silence. This is followed, in 1822, by *Storrs v. Barker*, 6 Johns. Ch. 166. *First Presbyterian Congregation v. Williams*, 9 Wend. 147, also affects land. A lessee under a lease giving the landlord a re-entry on default of payment, when there is no sufficient distress, was estopped from proving the existence of distrainable goods, having denied it when asked to show them for distraint. Cases on estoppel in pais are also found in the notes to *Doe v. Oliver* and the *Duchess of Kingston's Case*, in 2 Smith, Lead. Cas. 605. Chancellor Kent, though he decided the leading American cases on loss of estate by conduct, does not mention the doctrine even in the edition of 1832 of his Commentaries.

thorities, that the interest lost by the estoppel is nearly always one which does not appear on the public records.²⁹ Presumptions of knowledge may arise from registration or docketing incompatible with the estoppel; yet we know of no decision going so far as to say that a person cannot, by "conduct," lose an interest resting on the public records. But in the earlier cases courts of law refused to allow an estoppel, based on parol or matters in pais (such as the destruction of a deed that has taken effect), against the legal title.³⁰

Though the gist of estoppel in pais is the misrepresentation or concealment of an ownership or interest, and silence is only a mode of misrepresentation, the doctrine is often put quaintly in these words: He who is silent when he should speak will not be allowed to speak when conscience bids him to be silent. It means that if A, the owner of an interest in any property "stands by" (one of the technical phrases of the law of estoppel) and allows B to lay out money and labor in purchasing that interest, or in adding to its value (as by building on, or otherwise improving land), he will not thereafter be permitted to reclaim that interest.³¹

²⁹ Anderson v. Briscoe, 12 Bush. 346; Lathrop v. Groton Sav. Bank, 31 N. J. Eq. 273 (equitable owner in possession must be careful); Society for Establishing Useful Manufactures v. Lehigh Valley R. Co., 32 N. J. Eq. 329 (estoppel in equity if not at law). In De Herques v. Marti, 85 N. Y. 609, estoppel was applied to rents on land abroad. Contra, Kelly v. Wagner, 61 Miss. 299 (legal title not lost unless acts intentionally wrongful). Neal v. Gregory, 19 Fla. 356, comes near excluding a record title from estoppel by conduct. Putting one's title on record represents it truly to all the world.

³⁰ Bronson v. Wiman, 8 N. Y. 182.

³¹ Wendell v. Van Rensselaer, *supra*; Niven v. Belknapp, 2 Johns. 573 (perhaps a little more than silence); Phillips v. Clark, 4 Metc. (Ky.) 348 (quoting the maxim from Roberts on Fraudulent Conveyances). Ringo v. Warder, 6 B. Mon. 519, speaks of passively encouraging the purchaser. Similar is Breeding v. Stamper, 18 B. Mon. 183; Hill v. McNichol, 80 Me. 209, 13 Atl. 883; Newport & C. Bridge Co. v. Douglass, 12 Bush, 673 (vendor standing by and seeing mortgage taken); Stone v. Tyree, 30 W. Va. 687, 5 S. E. 878 (allowing land to be sold in his presence); Hill v. Epley, 31 Pa. St. 331 (allowing one's land to be sold as a decedent's estate); Collier v. Pfenning, 34 N. J. Eq. 22 (equitable owner in possession, seeing mortgage sale advertised, and not giving notice of his claim); Walker v. Flint, 3 McCrary (U. S. C. C.) 507, 11 Fed. 31 (standing by and seeing improvements going up); and other cases below. Long acquiescence itself is often treated as a species of estoppel; City of Louisville v. Bank of U. S., 3 B. Mon. 104. That the interest in land is in

But silence can be deemed a false representation only when there is a duty on the owner to speak out. When he can warn the public against dealing with the land only by bringing a suit for foreclosure, or to cancel fraudulent deeds, he cannot be blamed for remaining idle.³²

To reimburse a purchaser for his loss would often mean much more than to repay the outlay in purchase or improvement; such reimbursement would most often be so onerous, that when the estoppel works, the owner generally loses his interest altogether.³³ When "estoppel by conduct" applies, its effect is the same as that of a deed or grant. The owner who loses his interest because he has made untrue representation, on which another relies, as to such interest, is in the same plight as if he had conveyed it.³⁴

most or all of these cases held by an unrecorded title, is in itself a part of the concealment. In *Phillips v. Clark*, *supra*, the deeds had been actually lodged for record, but the recording tax had not been paid. *Contra, Owen v. Slatter*, 26 Ala. 547 (widow selling land under license as administratrix need not announce that it is sold subject to dower); *Yates v. Hurd*, 8 Colo. 343 (refusal to give information is not unfair silence); *Covington & L. R. Co. v. Bowler's Heirs*, 9 Bush, 492 (some other elements besides silence needed); *Corning v. Troy I. & N. Factory*, 40 N. Y. 191 (no estoppel by assent to an act which was lawful at the time).

³² *Viele v. Judson*, 82 N. Y. 32; *Meley v. Collins*, 41 Cal. 663 (where a forged deed from plaintiff had been put on record); *Allen v. Shaw*, 61 N. H. 95 (only when there is a duty to speak).

³³ It may take sometimes a much greater sum than that expended by the misled party to make him whole. In a case coming under the writer's observation, A. & B. owned adjoining houses and lots. B., in remodeling his house, under a mistaken construction of the deeds, pushed his front wall over a few inches on A.'s land, which A. at the time permitted. When he afterwards brought ejectment he was restrained by an equitable defense resting on these facts, which was successful. The sum necessary to make B. whole would have been much greater than the expense of extending his front wall over A.'s ground. *Klump v. Leibold* (MSS. Opinion, Ct. App. Ky., Dec. term, 1878). So, also, in *New Hampshire Land Co. v. Tilton*, 19 Fed. 73, where the misled party had bought a house standing in part on the ground of the estopped party.

³⁴ *Trustees of Town of Brookhaven v. Smith*, 118 N. Y. 634, 23 N. E. 1002: "The various declarations of the town through the trustees and town meetings must be considered as a single representation. They all had one purpose,—to inform S. that the town had no claim." *Town v. Needham*, 3 Paige, 545. Aiding in a sale by a third party is the strongest representation of

The purchasers at judicial or execution sales, or sales under powers in deeds of trust, often have occasion to profit by this doctrine of estoppel, either when the debtor gives up for sale an interest in land, which though liable to be sold, cannot lawfully be sold under the particular writ or procedure, or when other persons encourage the sale, or "stand by," who afterwards seek to set up an adverse title or superior liens on the lands thus sold.³⁵

Mr. Bigelow, the first text-book writer on estoppel, lays it down as the better opinion that the following five conditions should concur, to work an estoppel by conduct: (1) A misrepresentation or concealment of material facts; (2) that it is made with a knowledge of the facts; (3) that the party addressed was ignorant of the facts; (4) that the representation or concealment was made with the intent that the other party should act upon it; (5) that he did act upon it. Some late cases agree in requiring the concurrence of all these conditions; but, as shown below, there are others in which neither knowledge of the true state of facts nor an intention that another party should act upon the misrepresentation could be shown.³⁶

that party's title. *Morris v. Shannon*, 12 Bush, 96; *Ratcliff v. Bellfonte Iron-Works Co.*, 87 Ky. 559, 10 S. W. 365 (encouraging another to buy land); *Raley v. Williams*, 73 Mo. 310 (holder of tax title advising purchase of land). A receipt given by a mortgagee on the back of his mortgage is not a release, and may be contradicted between the parties; but it operates as estoppel by conduct, if another buys or lends money on the land on its faith. *Quattlebaum v. Black*, 24 S. C. 48. *Peery v. Hall*, 75 Mo. 503 (advising purchase, *a fortiori*, as to purchases from the bidder at a sale). On the other hand, where it is proclaimed at a judicial sale that a half interest is sold, and one buys accordingly at less than half the value, he gets only a half interest, though the writ ordered the sale of the whole. *Power v. Thorp*, 92 Pa. St. 346.

³⁵ *Richards v. Haines*, 30 Iowa, 574.

³⁶ Bigelow, *Estop.* 181, p. 480, relied on in *Bynum v. Preston*, 69 Tex. 287, 6 S. W. 428. See, also, *Blum v. Merchant*, 58 Tex. 400. In the cases cited in note 33, the representations were certainly not made with knowledge of their untruth. And see cases below. But that one who knows the truth cannot avail himself of untrue representations seems fully admitted. *Parker v. Barker*, 2 Metc. (Mass.) 423; *Huntley v. Holt*, 58 Conn. 445, 20 Atl. 469 (where the party misled by silence ought to and could have known the title); *Chadbourn v. Williams*, 43 Minn. 294, 47 N. W. 812. Probably all the conditions concur in *Little v. Giles*, 25 Neb. 313, 41 N. W. 186 (attorney selling land as that of his client's, and claiming it as his own); *Knowles v. Street*, 87 Ala. 357, 6 South. 273 (representation must be such as to induce reliance

According to some authorities, if the representation misleads (whether that representation is made in words or consists in silently standing by), it does not help the owner that he himself was ignorant of his rights; though undoubtedly another construction would, in case of doubt, be placed upon silence.³⁷ But a representation, made to a third person without any expectation that any one should act upon it, does not estop him that makes it from afterwards speaking out the truth about his title.³⁸ When both parties are acquainted with the facts, and the owner speaks of his want of title only as a conclusion of law, he is not estopped, as the party addressed or hearing the representation should inform himself as to the true state of the law.³⁹ As in cases of part performance, of which we have spoken as an exception to the statute of frauds, costly improvements furnish the most frequent ground for turning an otherwise wrongful possession into a lawful ownership.⁴⁰ In

upon it); *Grigsby v. Caruth*, 57 Tex. 269 (no estoppel when state of title known to both parties).

³⁷ *Trustees of Town of Brookhaven v. Smith*, *supra*, 118 N. Y. 634, 23 N. E. 1002 (here a representation not strong enough at the time when made was fortified by long acquiescence); *O'Mulcahy v. Holley*, 28 Minn. 31, 8 N. W. 906 (no estoppel by conduct, unless it influenced the other side); *Winslow v. Cooper*, 104 Ill. 235 (signing map, not intended to show to purchasers, was held no estoppel). But in *Nelson v. Claybrooke*, 4 Lea, 687, testimony in a suit between others was held to estop the witness.

³⁸ *Maguire v. Selden*, 103 N. Y. 643, 8 N. E. 517. Hence the holder of a recorded mortgage may assume that one holding under the mortgagor knows of the incumbrance, and need not stop him in the course of improvements. *Rice v. Dewey*, 54 Barb. 455; *Steel v. St. Louis Smelting & Refining Co.*, 106 U. S. 447, 1 Sup. Ct. 389 (on appeal from case cited in note 40),—no estoppel in favor of one who knows he has taken no title.

³⁹ *Craig v. Baker, Hardin (Ky.)* 289,—probably the earliest American case as to estoppel by conduct as affecting interests in land. Compare *Whitwell v. Winslow*, 134 Mass. 343.

⁴⁰ *Wendell v. Van Rensselaer*, *supra* (where “passive” assent to costly improvements is held good ground for estoppel); *Higinbotham v. Burnet*, 5 Johns. Ch. 184; *Greene v. Smith*, 57 Vt. 268 (two neighbors, one sells to third party, who builds on strip belonging to the other); *Gibson v. Herriott*, 55 Ark. 85, 17 S. W. 589; *Georgia Pac. R. Co. v. Strickland*, 80 Ga. 776, 6 S. E. 27 (railroad track); *Evansville & T. H. R. Co. v. Nye*, 113 Ind. 223, 15 N. E. 261 (main track of road); *Loud Gold Min. Co. v. Blake*, 24 Fed. 249 (waterworks or canal, as to use of water power); *Slocumb v. Chicago, B. & Q. R. Co.*, 57

Massachusetts, however, estoppel in pais is not carried very far, and valuable improvements do not even give validity to a mistaken boundary line, agreed upon by neighboring owners by parol.⁴¹ But even in that state an allotment of dower by parol has been so far sustained as an estoppel that an action of trespass against the widow was disallowed; but it should be kept in mind that such allotment was good at common law.⁴²

A person holding a secret mortgage or other incumbrance upon land may estop himself from setting it up against a purchaser or incumbrancer whom he causes, by his loud or silent representations, to believe that he has no claim, and whom he thus induces to buy the land, or to lend money upon it as a security; and, generally speaking, one who advances money on land has the benefit of estoppel in like manner as a purchaser.⁴³ But a distinction must here

Iowa, 675, 11 N. W. 641 (same principle); Society for Establishing Useful Manufactures v. Lehigh Val. R. Co., *supra* (same principle); but allowing canal to approach one's land, with evident intent of crossing it, works no estoppel to let it cross, *Stewart v. Stevens*, 10 Colo. 440, 15 Pac. 786; so in *Stockman v. Riverside Land & Irr. Co.*, 64 Cal. 57, 28 Pac. 116, an irrigation canal actually carried over plaintiff's land did not estop him from his property rights, as it had not been carried there under claim of right; *Lux v. Haggin*, 69 Cal. 256, 10 Pac. 674 (riparian owner not estopped in his water rights by permitting waterworks to be built away from his land); *Woodward v. Tudor*, *81 Pa. St. 382 (improvements on disputed boundary strip). Contra, also, *Minneapolis Trust Co. v. Eastman*, 47 Minn. 301, 50 N. W. 82, 930 (filling up submerged lands); *St. Louis Smelting & Refining Co. v. Green*, 4 McCrary, 232, 13 Fed. 208, where the party improving was at most allowed to take off his improvements. Building on disputed boundary strip, where neither party knew it was on the wrong side, held not to estop, *Cronin v. Gore*, 38 Mich. 381; or where a building is sold with a disputed strip, *Bramble v. Kingsbury*, 39 Ark. 131.

⁴¹ *Liverpool Wharf v. Prescott*, 7 Allen, 494; *Thayer v. Bacon*, 3 Allen, 163; *Proctor v. Putnam Mach. Co.*, 137 Mass. 159.

⁴² *Shattuck v. Gragg*, 23 Pick. 88. It was also held in Massachusetts that, where the owner of land allows it to be taken for public use without any compensation, his assignee cannot complain. *Haskell v. New Bedford*, 108 Mass. 208.

⁴³ *Wisehart v. Hedrick*, 118 Ind. 341, 21 N. E. 30; *Shuford v. Shingler*, 30 S. C. 612, 8 S. E. 799. As to the extent of estoppel, see *Com. v. Reading Sav. Bank*, 137 Mass. 431; *Alexander v. Ellison*, 79 Ky. 148. Several of the cases in the previous notes refer to incumbrances on one or the other side.

be drawn between a representation and a promise. One who holds a mortgage, and represents that it has been paid, is estopped as against any one who acts on that representation; but if he gives out that he has a claim, and promises not to enforce it upon the land, the promise is enforceable only as a contract; and if it falls under the statute of frauds, or is upon any other ground unavailable, it will not prevent the enforcement of the incumbrance; and this distinction will apply to other interests in the land as well as to mortgages and liens, but probably such a promise will much oftener be made to forego a lien than to give up a proprietary interest.⁴⁴

The receipt of the proceeds of a void sale by a party not under disability at the time is one of the best known examples of estoppel in pais; the acquittance given for the money—the “receipt” in the common meaning of that word—is not the ground of estoppel, but the act of taking the money, and thus giving an assent to what has been done, and often rendering it impossible to undo it. This may give validity to sales made by an attorney, whose powers have been exceeded, or have expired, or have been defectively carried out; or to a sale under color of a judgment, decree, or execution; or even to a tax sale, if there have been substantial proceeds.⁴⁵ Where a party has apparently lost his title, but might recover it yet, any action on his part, whether in pais or in the course of justice which is apt to lull those adversely interested into the belief that he acquiesces, is likely to estop him from any attack upon the proceedings through which he has lost his estate. So, where a mortgage

⁴⁴ Parker v. Barker, 2 Metc. (Mass.) 423. See cases countervailing this principle in note 49.

⁴⁵ Hartshorn v. Potroff, 89 Ill. 509; Tingue v. Village of Port Chester, 101 N. Y. 294, 4 N. E. 625; and Moore v. Roberts, 64 Wis. 538, 25 N. W. 564 (accepting award under condemnation); Williamson v. Jones, 39 W. Va. 231, 19 S. E. 436 (drawing proceeds of illegal chancery suit). Taking and holding lands in exchange estops the grantors from denying the power of those signing their names to deed. Goodell v. Bates, 14 R. I. 65; Kirk v. Hamilton, 102 U. S. 68 (where an appearance in the contest over the proceeds was held enough to estop the claimant from avoiding the sale); Hodge v. Powell, 96 N. C. 64, 2 S. E. 182 (proceeds of sale). See dictum to the contrary in Allan v. Kellam, 69 Ala. 442. See, also, French v. Powers, 120 N. Y. 128, 24 N. E. 296. But in Reed v. Crapo, 127 Mass. 39, a tax sale otherwise irregular was held void in toto though some of the cotenants had assented and taken the surplus, because the others had not, and the sale is indivisible.

had been collected by decretal sale by an unauthorized attorney, a suit by the principal to recover the amount collected out of the attorney's estate, though soon afterwards abandoned, estops him from denying the validity of the decree, and thus the title of the purchasers, not as an "estoppel by record," on account of the pleading filed by him, but as an estoppel by conduct.⁴⁶

The courts of the several states are much divided on the question whether persons under disability can be bound by estoppel, a question which has lost much of its importance since the late course of legislation, which has in most, or nearly all, the states enabled married women to make contracts by which they might lose their lands, though they may yet lack the capacity of conveying lands, except with prescribed formalities. It has been well said that misrepresentation by words, or even by silence, may be as effective as a deed; but it is difficult to see how it can be more effective than a deed in divesting the owner's title.⁴⁷ Hence it would follow that an infant cannot lose a landed estate by conduct, not even by giving a deed and misrepresenting his age, as has been discussed in the section on "Deeds by Infants." In like manner, where a married woman can, under the statute, pass her estate, or her inchoate right of dower, only by joining with her husband in a conveyance, and

⁴⁶ Robb v. Vos, 155 U. S. 13, 15 Sup. Ct. 4. There are many other cases of estoppel on the border between that in pais and estoppel by record or by deed. Thus, in Equitable Mortg. Co. v. Norton, 71 Tex. 683, 10 S. W. 301, husband and wife, selecting another homestead, were estopped from claiming the one which they mortgaged as the true one, and thus beyond the power of husband and wife to incumber.

⁴⁷ Lowell v. Daniels, 2 Gray (Mass.) 161; Concord Bank v. Bellis, 10 Cush. (Mass.) 276 (where a married woman's mortgage of land just deeded to her, to secure the purchase money was held void); Schnell v. Chicago, 38 Ill. 382 (infant consenting to sale by her mother); Rogers v. Higgins, 48 Ill. 211; Logan v. Gardner, 136 Pa. St. 588, 20 Atl. 625 (where an infant married woman, having sold land, was held not to ratify, by anything she did on coming of full age, but by what she did when discovered). But, even where the wife's disabilities are wholly removed, her reluctant assent may not estop her. Albright v. Albright, 70 Wis. 528, 36 N. W. 258. And an infant, 16 years of age, was excused for forgetfulness of her own title. Spencer v. Carr, 45 N. Y. 406. Throope, in his Massachusetts Digest, heads several cases like those above with the remark: "There was no estoppel in pais of a feme covert under the former law."

acknowledging the execution thereof in a prescribed way, or by a proceeding in court regulated in all its stages with a view to the security of her rights, it would seem an attempted usurpation by the courts that she can also pass her estate or her right of dower by silence or by misrepresentation.⁴⁸ But here also the decisions are by no means uniform, and when the intent to follow out the statutory methods has been defeated only by the unskillfulness of lawyers, or negligence of officials, while an estate has been fairly sold and paid for, a court can hardly be blamed for holding even parties under disability bound on the score of estoppel, often on the plausible ground that either in inducing the purchase or in repudiating it they are guilty of a tort.⁴⁹ A distinction has been

⁴⁸ The conflict of decisions as to misrepresentation of age by infants has been shown in section on "Deeds by Infants." In *Innis v. Templeton*, 95 Pa. St. 262, where the older authorities are gathered, a married woman, it was held, could not lose her estate by estoppel, even where her conduct amounted to fraud.

⁴⁹ In Indiana, section 5117 of the Revised Statutes of 1881 says of the married woman, who is still under disability as to conveying land or contracting for its sale, "She shall be bound by an estoppel in pais like other persons." See *Wertz v. Jones*, 134 Ind. 475, 34 N. E. 1. (Her disability to become surety for the husband raised the question whether she was estopped by the admission of a cash consideration, which was rather an estoppel by deed.) See *Duckwall v. Kisner*, 138 Ind. 99, 35 N. E. 697. *Stone v. Werts*, 3 Bush, 486 (where a married woman was held by an untrue admission of record, made to get rid of a "separate estate," which the statute protected against alienation). See, also, *Draper v. Allen*, 114 N. C. 50, 19 S. E. 61; *Lloyd v. State*, 134 Ind. 506, 34 N. E. 311 (the representations in these cases are not as to the grantor's capacity to convey); *McBeths v. Trabue*, 69 Mo. 642 (wife, then under disability, and infant children, not estopped by recognition of right of way). Of course, a person under disability is not estopped by receipt of proceeds, *McLaurin v. Wilson*, 16 S. C. 402; otherwise there would be no disability. Nor when the statute requires the wife to join in the conveyance of the homestead, can her joining in its bodily surrender work an estoppel, *Law v. Butler*, 44 Minn. 482, 47 N. W. 53; though it may in some states operate as an abandonment. *Beckett v. Sawyer*, 91 Ky. 106, 15 S. W. 12 (wife's consent to sale by husband of land in which she has a resulting trust clears the purchaser of fraud, and thus gives purchaser a good title). *Connolly v. Braustler*, 3 Bush, 702 (wife announcing at chancery sale that she would not claim dower) seems incorrect, for there was no misrepresentation, but a promise, and this invalid under the statute of frauds. Same objection lies to the decision in *Southard v. Sutton*, 68 Me. 575, where one entitled to redeem land induced another to

made between the representation by an infant or feme covert, which is simply misleading, and one which is designed to mislead; and, as an action for deceit would undoubtedly lie in the latter case in favor of any one who should be injured, to avoid multiplicity of actions it might be best to meet the action of such wrongdoer for the land by an estoppel.⁵⁰

The now familiar rule that neither the tenant, nor any one claiming under him, can dispute the landlord's title, was first announced in a court in banc in 1816, upon precedents on the circuit running back only 25 years. Having obtained possession of the land from the landlord, the tenant was not allowed, after buying in an outstanding mortgage, to set it up as defense at the expiration of or upon the forfeiture of his term, much less to prove a mortgage outstanding in other hands, in order to show the want of a legal title in his landlord. The rule is now often applied to an attempt of the tenant to defeat the landlord by setting up a tax title against him; but it would not debar the tenant from setting up a title under a judicial sale, for the estoppel in pais would then be overborne by the higher estoppel by matter of record.⁵¹ One who obtains possession by misrepresentation, fraud, or force, stands in no better plight than one who obtains it fairly by a lease. A court will not

purchase it by promising not to redeem, and was held estopped; and to *Kirkpatrick v. Brown*, 59 Ga. 450, where a right of way was given to the purchaser of land over other land of the vendor by estoppel, because he had promised it at the sale, and had obtained an addition to the price.

⁵⁰ *Blakeslee v. Sincebaugh*, 71 Hun, 412, 24 N. Y. Supp. 947 (still open to reversal), relies on *Spencer v. Carr*, 45 N. Y. 406, and on 1 Story, Eq. Jur. § 385 ("neither infancy nor coverture will constitute any excuse," etc.; "for neither an infant nor a feme covert is privileged to practice deception," etc.); Sugd. Vend. (8th Am. Ed.) c. 23, § 1, pl. 17; *Howell v. Hale*, 5 Lea, 405 (married woman estopped by representations from denying consideration of mortgage). In *Grim's Appeal*, 105 Pa. St. 375, a married woman was held estopped by long acquiescence in an administrator's sale.

⁵¹ *Doe d. Knight v. Smythe*, 4 Maule & S. 347; *Doe d. Bristow v. Pegge*, a nisi prius case, reported in note 1 Term R. 758. Mr. Bigelow enters into a historic discussion on the origin of the rule. The view given above is his own. He shows the difference between the present rule, which is grounded on the "permissive possession," and the older rule, the only one known to Lord Coke, which rested on the seal to the lease, and was only a part of the law of estoppel by deed.

listen to his proof of title till he has restored the possession.⁵² But when the landlord's title, such as he had when possession was taken, comes to an end,—for instance, when the landlord had only a term for years, or life estate, or defeasible fee, or when his interest is sold under execution, foreclosure of mortgage, or decretal sale, or aliened by his own act,—the tenant is justified in attorn ing to the new owner, or to obtain from him a new title.⁵³ And a constructive eviction will justify an attornment. As the tenant is estopped only through the "permissive possession," he may acquire an adverse title during his term, and set it up against the landlord after the expiration of the term, and after he has surrendered his possession.⁵⁴

When we say that an estoppel is binding on parties and privies (as it inures to parties and privies),⁵⁵ we cannot include life tenants and remainder-men among privies in estate. For the estoppel in pais works like a deed at best, and the life tenant can no more cut off the rights of the remainder-man by guilty silence, or by false representations, than he can do so by a deed of conveyance.⁵⁶

⁵² Doe d. Johnson v. Baytup, 3 Adol. & E. 188, 4 Nev. & M. 837. The modern American practice is to eject the person thus obtaining possession by the summary writ of forcible entry without regard to his title, as was done in Haupt v. Pittaluga, 6 Bush, 493, where the landlord, during the term of a lease for five years, got "the keys" by collusion from an outgoing subtenant, and was thus unceremoniously put out.

⁵³ Hopcraft v. Keys, 9 Bing. 613; Pendleton v. Dyett, 4 Cow. 581; Hamilton v. Cutts, 4 Mass. 349; Gore v. Brazier, 3 Mass. 523 (attorning to creditor to whom land is set off on execution). In Hunt v. Cope, Cowp. 242, on avowry for rent, Lord Mansfield said the tenant should have pleaded eviction.

⁵⁴ Gable v. Wetherholt, 116 Ill. 316, 6 N. E. 453.

⁵⁵ Hills v. Miller, 3 Paige, 254; Child v. Chappell, 9 N. Y. 246; Midland Ry. Co. v. Smith, 113 Ind. 233, 15 N. E. 256 (estoppel by allowing railroad company to lay its track over land inures to new company buying road at judicial sale).

⁵⁶ McGregor v. Wait, 10 Gray, 72. In conclusion it may be proper to quote the words with which the editor of the ninth English edition of Smith's Leading Cases closes the notes to the Duchess of Kingston's Case: "The truth is that the courts have been for some time favorable to the utility of the doctrine of estoppel, hostile to its technicality. Perceiving how essential it is to the quick and easy transaction of business that one man should be able to put faith in the conduct and representation of his fellows, they have inclined to hold such conduct and such representations binding in cases where a mischief or injustice would be caused by treating their effect as revocable.

§ 139. Election under Will or Deed.

It is an axiom in the law that a person cannot claim both under and against the same deed or will. That is, if a testator devises or a grantor conveys to A land or goods of which such testator or grantor has the power thus to dispose, and in the same deed or will gives to B land or goods which but for this instrument would belong to A, then A cannot take and retain the devise or grant made to himself without yielding up to B his own rights to the things given, devised, or bequeathed to the latter. The case arises oftenest under wills, and the doctrine of "election," as it is generally called, is said to have come from the imperial Roman law on testaments, passing, with many other doctrines of that law, into the English equity system.⁵⁷ The doctrine applies, however, as fully to deeds as to wills;⁵⁸ but it seems never to have been applied in the Roman

At the same time they have been unwilling to allow men to be entrapped by formal statements and admissions which were perhaps looked upon as unimportant when made, and by which no one ever was deceived or induced to alter his position. Such estoppels are still, as formerly, considered odious." In short, in measure as estoppel by record and estoppel by deed have lost, estoppel by conduct has gained ground.

⁵⁷ The chapter on "Election and Satisfaction" in Story's Equity is often quoted as the source of law on this subject (sections 1075-1095); but it is very unsatisfactory by the absence of all detail. Jarman on Wills is pretty full, especially on election by the widow between dower and the provisions of the will. A very full exposition of the doctrine can be found in 1 White & T. Lead. Cas. Eq. pp. 271, 273, the cases of Noys v. Mordaunt, 2 Vern. 581, and Streatfield v. Streatfield, Cas. Talb. 176, being transcribed there, with copious notes by the editors, and American notes by Hare & Wallace. For a short exposition of the state of the law in 1844 we refer to Mr. Sumner's notes to Bristow v. Warde, 2 Ves. Jr. 336. Kent's Commentaries are almost silent on the subject, except as to election by dowress.

⁵⁸ Green v. Green, 2 Mer. 86, is a fair instance. The defendant's father being tenant in tail in remainder, and thus incapable of barring the entail, of manor L., entered into a marriage settlement with his wife (the plaintiff) and her parents, and by one deed he and they settled manor L. and manor T., which belonged to the latter in fee. A life estate in L. was limited to the plaintiff, to begin after husband's death. When he died, defendant took possession of manor T., under the deed of settlement, and sought by an ejectment to recover L. from his mother, as issue in tail came into possession, the deed being ineffectual to break the entail. He was enjoined on the

law but to the latter. It is generally enforced by courts of equity; for courts of law can only deny one right after the claimant has estopped himself by claiming the other and inconsistent right. They cannot compel an election, and thus relieve the opposite party from doubt and uncertainty. Moreover, the common-law courts were formerly hampered by the higher dignity which land, in their eye, had over personality, and would not allow the receipt of goods or effects to work an estoppel against an estate of freehold in land.⁵⁹

Whatever distinction the Roman law may have drawn, it is certain that in the English and American law the knowledge of the donor is wholly immaterial; that is, a case for election will arise just as well when he gives away through mistake or ignorance as when he knowingly and purposely grants or devises what does not belong to him, or what he cannot thus grant or devise.⁶⁰

In order to make a case for an election, the deed or will of the donor must in clear words give away the very estate or interest belonging to him who receives his bounty in another part of the same instrument. Thus, if I devise to my son my house and lot on A street, of which one-half really belongs to my daughter, and devise to her my farm in B county, which is my own, and which I can devise, she is estopped from claiming her share in the house and lot and at the same time taking the farm. But, if I devise to my son "my real estate in the city of D," the gift will be construed to refer only to such interest in the house and lot as I really own; and the devisee of the farm will be allowed to take it and retain her estate in the city lot. This distinction has been often made where such

ground of election. *Dillon v. Parker*, 1 Swanst. 394, note, is generally quoted for the position. There are but few American cases, aside from the ordinary case of a jointure otherwise not obligatory, which a widow cannot take without surrendering her dower. Marriage settlements are uncommon in this country; and, as such papers are drawn after conference by two or more parties, attempts of the settler to include estates not within his power are rare.

⁵⁹ Story, Eq. Jur. §§ 1075, 1089, is very full on the advantages of the remedy in equity. Co. Litt. 36b, is the authority for not allowing a freehold to be barred by the receipt of a chattel. See hereafter under "Election against Dower." That the devise or bequest is small or remote is immaterial. *Fulton v. Moore*, 25 Pa. St. 468, and several of the Pennsylvania cases below.

⁶⁰ Take, as instances, *Isler v. Isler*, 88 N. C. 581; *Borden v. Warde* (N. C.; 1889) 9 S. E. 300; *Barbour v. Mitchell*, 40 Md. 151.

general words as "my estate" or "my estates" were used.⁶¹ Lord Thurlow, overruling older precedents, very properly refused the admission of extrinsic evidence to show that the testator meant to devise the whole fee in a certain manor, over which he had not the power of disposition.⁶² Where a testator has a partial interest in a tract of land, and still more where he has a present but defeasible or terminable estate, it may always be doubted whether he intended to devise any more than his interest; and it would be hard to compel the owner of the remaining interest to give up his property as the price of another devise. It was thus the old doctrine, still in force in several states, as will be shown in another section, to suppose that a married man, in devising his lands, means only to dispose of two-thirds, and the remainder after his wife's life in the other third, of his lands, unless he avows the contrary intent.⁶³

The interest adverse to the deed or will may be wholly independent of the donor. Thus, the donee is often a cotenant with the donor, or a remainder-man after his life estate, either under the preceding deed or will, or as heir to his mother, from whom the donor holds over by courtesy. But often the donee derives his adverse right from the donor in a manner which the latter cannot override or has not taken the proper steps to override. Such is the ordinary case of the dowress; of issue in tail,⁶⁴ where the tenant has not before the devise or deed properly barred the entail; and, lastly, where the will is inoperative as to one part of the estate it purports to convey. Formerly, when after-acquired lands did not pass by will, the heir was always bound to elect between his title by descent to such lands, if a clear intention to devise them appeared, and legacies in the will.⁶⁵ Where the will lacks the forms

⁶¹ *Pratt v. Douglas*, 38 N. J. Eq. 516; *Miller v. Springer*, 70 Pa. St. 269 (see 1 *Jarm. Wills*, 456).

⁶² *Stratton v. Best*, 1 Ves. Jr. 285; *Clementson v. Gandy*, 1 Keen, 309; *Doe v. Chichester*, 4 Dow, 65.

⁶³ *Dowson v. Bell*, 1 Keen, 761, followed in New York in dower cases.

⁶⁴ The devisee's title is unconnected with the devisor's in *Brossenne v. Schmit*, 91 Ky. 465, 16 S. W. 135; *Cox v. Rogers*, 77 Pa. St. 160; *Whitridge v. Parkhurst*, 20 Md. 62; but in *Green v. Green and Noys v. Mordaunt*, *supra*, and *Tierman v. Roland*, 15 Pa. St. 429, an election or estoppel was put upon the issue in tail.

⁶⁵ *Thellusson v. Woodford*, 13 Ves. 209; *Rendlesham v. Woodford*, 1 Dow.

demanded for passing lands (e. g. where more witnesses are required to establish the disposition of land than of personalty), it would defeat the statute of wills to take them from the heir by equitable election; though the testator could undoubtedly annex an express condition to his bequest to the heir, that he must give up certain lands.⁶⁶ Where part of the will is void for want of power (e. g. a married woman devising land under a power of appointment, and other property without any legal authority to make a will thereof), the latter part is considered as not written, and there is no election.⁶⁷ Where a will conveys land in two states, but is not sufficient in form to pass land in one of them (generally in the state not of the testator's domicile), the same distinction would apply; that is, the heir could not be forced to elect in order to save his right by descent, unless the devise which turns out inoperative is inseparably bound up with the other parts of the will.⁶⁸

There have been wills in which devises were given on the express condition that the devisees must give up certain property rights of their own. These can hardly be called cases of election.⁶⁹ Where a devisee has taken a devise under the will, he is not thereby estopped from afterwards asserting a right against the will that comes to him from another source; such as a courtesy from a wife who takes as issue in tail, or reversioner.⁷⁰

249 (before will act of 1 Vict. c. 26); *Beall v. Schley*, 2 Gill (Md.) 181 (while *City of Philadelphia v. Davis*, 1 Whart. 490, had gone the other way). See, also, *Hall v. Hall*, 2 McCord, Eq. (S. C.) 269, where the intent to embrace after-acquired lands did not clearly appear. It is quite allowable for the heir who takes a devise under the will to contend that parts of the estate do not pass by it, and to claim them by intestacy. *Hancock's Appeal*, 112 Pa. St. 532, 5 Atl. 56.

⁶⁶ *Recarney v. Macomb*, 16 N. J. Eq. 189, following *Melchor v. Burger*, 1 Dev. & B. Eq. (N. C.) 634.

⁶⁷ *Rich v. Cockell*, 9 Ves. 369.

⁶⁸ *Jones v. Jones*, 8 Gill (Md.) 197. *Contra*, *Nutt v. Nutt*, 1 Freem. Ch. (Miss.) 128. In *Brodie v. Barry*, 2 Ves. & B. 127, and *McCall v. McCall*, 1 Dru. 283, an English court compelled the heir to elect between the devise and the inheritance in Scotland; but this is on the principle of dower, as the heir cannot be disinherited by will under the Scotch law.

⁶⁹ *Preston v. Jones*, 9 Pa. St. 459.

⁷⁰ *Lady Cavan v. Pulteney*, 2 Ves. Jr. 544, 3 Ves. 384; *Brodie v. Barry*, 2 Ves. & B. 127.

In cases in which equity alone will relieve against the assertion of inconsistent rights, it has often stopped short of forcing an absolute election, under which the more valuable of the two estates would always be chosen; but has in some cases allowed the claimant of both to keep the smaller of the two estates, upon compensating those in the opposite interest out of the larger. In fact, it was long thought that equity could do no more than this; and there are cases yet in which the equity judge will go no further.⁷¹

Where an election is made otherwise than under a decree of court, it is either by deed or by acts in pais. A conveyance of one of the estates to a third party puts it out of the power of the claimant to retract his choice, and is binding upon him, unless where compensation would be accepted.⁷² On an election by acts in pais (except by a widow choosing for or against her dower), American authorities are very scant. The question runs into the more general subject of "equitable estoppel"; that is, such acts will be deemed binding, as put the opposite party into a worse condition, and thus would render a new and different choice unconscionable.⁷³

There cannot well be an election between the whole and a part. A person cannot be barred of an estate by receiving a part of it under a mistaken claim. Thus, a widow, who owns a tract of land, but has a third of it allotted to her as her dower in her husband's estate, is not barred, by taking possession of it under such name, from claiming the rest.⁷⁴

⁷¹ In *Green v. Green*, *supra*, note 58, a search was made through MSS. opinions, and *Tibbits v. Tibbits* was found, published now with it in 2 *Mervale*, on page 96, note, on the strength of which the court compelled an actual election. Compensation is named as the proper remedy, when the lot claimed by paramount title is the less valuable, in *Lewis v. Lewis*, 13 Pa. St. 79. *In re Stokes' Estate*, 61 Pa. St. 137, is a case of "compensation," but hardly of election, though often quoted as such.

⁷² See White & Tudor's notes to the *Leading Cases* (page 283), *supra*, citing *Bristow v. Warde*, 2 Ves. Jr. 336; *Gretton v. Haward*, 1 Swanst. 433; *Padbury v. Clark*, 2 Macn. & G. 298,—deriving the doctrine of election from or connecting it with compensation.

⁷³ See authorities in preceding section. *Fitts v. Cook*, 5 *Cush.* 596 (man's children, heirs also of his wife, may occupy, jointly with her, the husband's land, without being put to an election by his will, in which he devises the wife's land).

⁷⁴ *Thompson v. Renoe*, 12 Mo. 157.

That the person in whom two inconsistent rights meet is under a disability, such as infancy, coverture, or unsoundness of mind, does not in any way free him or her from the necessity of election; and as it may be impracticable and always is inconvenient, to await the removal of the disability, a court of equity should, upon a full examination of the relative values of the two rights, make a choice for the person under its protection, or confirm the election which may be made by a guardian or committee.⁷⁵

Although, as a general rule, a will that is void by reason of the testator's lack of testamentary capacity does not put the devisee to an election, yet the acceptance of benefits under such a will may have the ordinary results of an election. Thus, where a married woman could devise only by the husband's written consent, but her will, made without it, had been probated and her husband had acted as executor under it, and had taken and kept possession of the lands devised, the land in the hands of his heirs was held bound by the legacies which in the will were charged upon it.⁷⁶

§ 140. Between Will and Dower.

Among the cases in which an election must be made between two incompatible rights, and if once made of the one bars the other, the most frequent and most important is that between devises or bequests under a will and dower; less frequent between dower and a jointure given so as not to be in itself binding on the widow. The forced heirship, which some of the states have in late years substituted for dower at common law, may give rise to similar questions as the latter; and since almost every state has given to married women the power to make their wills, the husband's courtesy or rights analogous to it may also have to be chosen or rejected by the husband, in competition with less or greater benefits under the wife's will.

The great advantage of dower over a devise or bequest in the husband's will is the security of the former against the debts and incum-

⁷⁵ *McQueen v. McQueen*, 2 Jones, Eq. (N. C.) 16; *Robertson v. Stevens*, 1 Ired. Eq. 247. And see under "Election as against Dower and Courtesy," as to insane widow.

⁷⁶ *Smith v. Wells*, 134 Mass. 11.

brances of the husband. It is not destroyed by the insolvency of the estate. Her title is superior not only to that of the heirs and devisees, but also to that of the creditors of the husband. The first question upon the face of the will is always: Is the provision for the wife "in lieu of dower" or is it "in addition to dower?"

At common law the provision by will in lieu of dower, even if charged on the testator's lands, or a freehold estate in such lands, puts her to an election only when it is declared in express terms to be given in lieu of dower, or when the intention is so clearly implied as to leave no doubt, its other provisions being such as to be "disturbed and wholly defeated" by an allotment of dower. This is one of the technical rules of construction which has been carried so far as often to defeat the undoubted intention.⁷⁷

Nearly all the states in which dower is still known have legislated on the subject. Some of these laws (Connecticut, New Hampshire,

⁷⁷ 1 Jarm. Wills, pp. 396-410. The cases in which the widow is put to her election even under the old rule, quoted by him, are Birmingham v. Kirwan, 2 Schoales & L. 444 (doubted by Mr. Jarman, and opposed by Strahan v. Sutton, 3 Ves. 249); Butcher v. Kemp, 5 Madd. 64; Chalmers v. Storil, 2 Ves. & B. 222 ("I give to my wife, A., and to my two children, all my estates whatsoever, to be equally divided amongst them"). See New York case below to the contrary. Also, Dickson v. Robinson, Jac. 503 (devise of lands and personality to widow in trust for the equal benefit of herself, two daughters, etc.); Roberts v. Smith, 1 Sim. & S. 513; Reynolds v. Torin, 1 Russ. 129 (four-sevenths of the income of estate),—aside of the conflicting cases on the effect of devise of a rent charge to the widow. In their argument on the widow's side, the judges treat her as a sort of joint owner with the husband in the estates standing in his name. It is said (4 Kent, Comm. 57) that though a "collateral satisfaction" by money or chattels is given by will, which the widow cannot in equity accept without surrendering her dower, it cannot be pleaded at law against the claim for dower. This is based on Co. Litt. 36b (see O'Brien v. Elliot, 15 Me. 125), and still recognized as in force in Larrabee v. Van Alstyne, 1 Johns. 307. But Kent admits that the modern tendency is towards holding her to her election between chattels and dower, even at law; and as, in states keeping up a separate equity system, suits for dower are generally brought on the equity side, the distinction is unimportant. For the old rule which the dower act abolished in England in 1833, he quotes French v. Davies, 2 Ves. Jr. 572; Kennedy v. Nedrow, 1 Dall. 415; Adsit v. Adsit, 2 Johns. Ch. 448; Jackson v. Churchill, 7 Cow. 287; Pickett v. Peay, 3 Brev. (S. C.) 545; Evans v. Webb, 1 Yeates (Pa.) 424; Perkins v. Little, 1 Greenl. 150. See a full discussion of the doctrine in Stephens v. Gibbes, 14 Fla. 331, and in Blunt v. Gee, 5 Call, 481.

New York, Arkansas) only regulate the manner of election when the husband's will contains a provision in lieu of dower; thus leaving the old rule in force. Other states establish the contrary rule, directing that every provision for the widow shall be taken to be in lieu of dower, unless it is otherwise expressed in the will. It is so in Massachusetts and Maine, Pennsylvania, Maryland, North Carolina, Illinois, Michigan, Wisconsin, Delaware (when there is a devise of land); and the provision has the like effect in New Jersey and Missouri: or at least the election is called for by the statute in case of any provision, which tacitly repeals the old rule, as in Ohio, Virginia, West Virginia. Alabama, Florida, and Kentucky (the latter by the most direct language) also abrogate the old presumption; while in Vermont the widow must elect, if the provisions of the will are, in the opinion of the probate judge, in lieu of dower, which seems to make it all a matter of construing the will.⁷⁸ Georgia, on the other hand, has formulated the old rule into a clause of her statute, and enforces it most faithfully.⁷⁹

Though in Connecticut the old rule is recognized, it has been held there that directions in a will as to the time when the devisees other than the widow are to enjoy their shares or devises are incompatible with dower; and where the devises to the widow take up the greater part of the estate they cannot be in addition to dower.⁸⁰

⁷⁸ Michigan, § 5750, copied from the Massachusetts act; Rhode Island, c. 182, § 11; Delaware, c. 87, § 5; Mississippi, § 4496, as to the forced heirship of husband and wife if the provisions of the will do not satisfy them. The Pennsylvania dower act of 1832 is so broad and explicit that it leaves no room for construction (see "Dower," 5, 10). The cases in that state only turn on the mode of election, not on the necessity for it. Vermont, Rev. Laws, § 2219; Florida, § 1830. See below as to statutes of other states and decisions enforcing them. A plain case under the Michigan laws is Dakin v. Dakin, 97 Mich. 287, 56 N. W. 562.

⁷⁹ Georgia, Code, § 1764. The wife must after the husband's death assent to a "provision made by deed or will * * * expressly in lieu of dower or where the intention of the husband is plain and manifest," etc. In Tooke v. Hardeman, 7 Ga. 20, based on the New York cases, the widow got by the will a tract of land, some chattels, and her "support." Not a bar. In Gibbon v. Gibbon, 40 Ga. 562, the legacy was, on its face, in lieu of dower.

⁸⁰ Connecticut, Gen. St. § 621; Alling v. Chatfield, 42 Conn. 276; Anthony v. Anthony, 55 Conn. 1256, 11 Atl. 45. In this and similar cases, evidence as to the amount of the estate was admitted. The New Hampshire act, c. 186,

The New York courts have gone to the furthest limit, being matched perhaps by the decisions in Georgia. They treat the widow's dower as if it were a rent charge by which the husband's estate is burdened, and as if he had before his mind when making his will only the incumbered estate, which remains his own. Thus, where the testator directs that his widow is to have one-third of the estate, and the children the two other thirds, these latter are subjected to dower. Where she is given a life estate in all the lands, she may hold one-third thereof as dower, free of debts. Where a comfortable support is given her, it must come out of the two-thirds not allotted to her.⁸¹ Only where the executor is authorized to sell in a particular way which excludes a sale subject to dower, or where the whole rents are appropriated, or the mode of enjoyment is burdened with insurance and taxes, or otherwise minutely prescribed, the courts will admit that the devises of the will would be "disturbed" by the allowance of dower.⁸²

Iowa, at an early day, followed the old rule, even in such cases as where one-third of the estate is expressly given to the widow, and the rest to the children. Yet the charge of the widow's comfortable support was held, in its very nature, to be in lieu of dower.

The statute in this state says that the wife's dower shall not be affected by a will unless it be accepted; the corresponding rights of the husband are secured in like manner.⁸³ The change of dower

§ 13, speaks of the husband or wife waiving the "provision intended to be in lieu of dower or courtesy." Arkansas, § 2534 (land, pecuniary or other provision in lieu of dower); no decisions.

⁸¹ New York, Rev. St. pt. 2, c. 1, tit. 3, § 13. *Konvalinka v. Schlegel*, 104 N. Y. 125, 9 N. E. 868, and *Lewis v. Smith*, 9 N. Y. 502, are the later extreme cases. Among the older not quoted in note 77 are *Smith v. Kniskern*, 4 Johns. Ch. 9; *Wood v. Wood*, 5 Paige, 596 (executor to sell and distribute); *Church v. Bull*, 2 Denio, 430. A legacy of chattels can be held in lieu of dower only by express words. *Sanford v. Jackson*, 10 Paige, 266; *Savage v. Burnham*, 17 N. Y. 562. The New York doctrine that a trust for supporting the widow is not in its nature in lieu of dower is sustained by *Douglas v. Feay*, 1 W. Va. 26.

⁸² *Vernon v. Vernon*, 53 N. Y. 351; *Tobias v. Ketchum*, 32 N. Y. 319; *In re Zahrt*, 94 N. Y. 605. Where the words "in lieu of dower" are used, other words of opposite sense may be rejected. *Nelson v. Brown*, 66 Hun, 311, 20 N. Y. Supp. 978.

⁸³ Iowa, § 2452; *Parker v. Hayden*, 84 Iowa, 493, 51 N. W. 248 (devise of LAND TITLES V. 2—66

from a life estate into a fee by an act of 1862 has in many cases rendered it less, in some cases more compatible with the provisions of the will; but, so modified, the rule has been adhered to as well since as before this change in the nature of dower.⁸⁴

In Delaware the old rule is in force where the will gives personality only. A direction to sell the lands and divide the proceeds, under a decision in this state, would not put the widow to her election, because the land might be sold subject to dower; but in a late case it was held that a recital in the will about the bequest, such as "according to law," though informal, would sufficiently indicate the testator's intent to conclude the widow.⁸⁵

On the other hand, the courts have enforced the opposite rule in Massachusetts and Maine;⁸⁶ in Wisconsin;⁸⁷ in Maryland (which adopted the new rule in 1798);⁸⁸ in Virginia (where it was only in-

life estate in one tract does not put wife to election); *Corriell v. Ham*, 2 Iowa, 552; *Clark v. Griffith*, 4 Iowa, 405; *Watrous v. Winn*, 37 Iowa, 72; *In re Blaney* (Iowa) 34 N. W. 768 (does not appear in regular Reports); *Rittgers v. Rittgers*, 56 Iowa, 218, 9 N. W. 188 (trust for children in rents and profits for a time). Contra, *Van Guilder v. Justice*, 56 Iowa, 669, 10 N. W. 238 (where land was to be divided); *Sully v. Nebergall*, 30 Iowa, 339; *Ashlock v. Ashlock*, 52 Iowa, 319, 1 N. W. 594, and 3 N. W. 131 (comfortable support bars dower).

⁸⁴ *Cain v. Cain*, 23 Iowa, 31; *Potter v. Worley*, 57 Iowa, 66, 7 N. W. 685, and 10 N. W. 298; *Metteer v. Wiley*, 34 Iowa, 214 (strong cases in favor of the widow, which could not well have arisen under the old law); *Craig v. Conover*, 80 Iowa, 355, 45 N. W. 892 (against dowress).

⁸⁵ *Kinsey v. Woodward*, 3 Har. (Del.) 459. Contra, *Warren v. Morris*, 4 Del. Ch. 289.

⁸⁶ Massachusetts, Pub. St. c. 127, § 29; Maine, c. 65, § 5. They date back to 1783. *Reed v. Dickerman*, 12 Pick. 146, and incidentally in many later cases; *Dow v. Dow*, 36 Me. 211, where the intent was professed not to deprive the widow of her dower, and, the devise being larger than dower, she was held not dowable from lands devised to others.

⁸⁷ Wisconsin, St. § 2171. In this state a direction to the executors to support the widow according to her wants, without limit to their discretion, was held "a provision," barring dower, unless refused. *Van Steenwyck v. Washburn*, 59 Wis. 483, 17 N. W. 289. The statute says: "If any lands be devised to a woman, or other provision be made for her in the will of her husband, she shall," etc.

⁸⁸ Maryland, Pub. Laws, art. 93, § 291, dating back to subchapter 13 in Acts of 1798. "A bequest is a flat bar" unless renounced. *Collins v. Carman's* (1042)

troduced in 1873);⁸⁹ most rigorously in Kentucky;⁹⁰ in Illinois (where the dower act speaks of a devise of land, any interest therein, or any other provision);⁹¹ Missouri;⁹² under very broad and explicit statutes, dating back to 1784, in North Carolina and Tennessee;⁹³ in Ohio;⁹⁴ and in Alabama;⁹⁵ that is, in these states a provision in

Ex'r, 5 Md. 503, 516 (the devise was to another in trust for supporting the widow); *Gough v. Manning*, 26 Md. 347 (every devise).

⁸⁹ *Nelson v. Kownslar*, 79 Va. 468. The old cases in Virginia, before the act of 1873, were the other way, and almost as strong as in New York. The West Virginia statute on election (chapter 78, § 11) says nothing about a devise being "in lieu of dower." The section applies also to the husband's election between courtesy and the wife's will. *Douglas v. Feay*, 1 W. Va. 26, under the old Virginia law, held that a devise of land to the daughter on condition of her boarding, lodging, and clothing the widow was not a provision in lieu of dower.

⁹⁰ Gen. St. c. 52, art. 4, § 6; St. 1894, § 2136 (section 1404 provides for the formal relinquishment); *Huhlein v. Huhlein*, 87 Ky. 247, 8 S. W. 260; *Hinson v. Ennis*, 81 Ky. 363; *Grider v. Eubanks*, 12 Bush, 510 (even where the provision of the will turned out worthless through insolvency).

⁹¹ Chapter 41, § 10, which, if the will is not waived, bars equally the husband's courtesy and wife's dower, "unless otherwise expressed in the will"; *Haynie v. Dickens*, 68 Ill. 267; *Jennings v. Smith*, 29 Ill. 116 (a life estate is enough to bar dower). The Illinois cases hold that no separate elections can be made as to personality and land. The acceptance of either bars dower. A devise durante viduitate puts the widow to her election. *Stone v. Vandermark*, 146 Ill. 312, 34 N. E. 150.

⁹² Missouri, St. § 4527; *In re Brant's Will*, 40 Mo. 266. Note the wording as to interest in land. *Pemberton v. Pemberton*, 29 Mo. 409; *Martien v. Norris*, 91 Mo. 465, 3 S. W. 849. Evidence of the quantity of estate admissible on question of intention.

⁹³ Tennessee, Code, § 3251. Widow has dower "when a satisfactory provision is not made for her"; that is, one which she is willing to accept. *Malone v. Majors*, 8 Humph. 577 (under the North Carolina act); *Reid v. Campbell, Meigs*. 378. *Craven v. Craven*, 2 Dev. Eq. 338 ("every testamentary disposition by the husband in favor of the wife is a case of election"), applies as well to bequests as devises of land.

⁹⁴ Ohio, Rev. St. § 5963. "If any provision be made" applies equally to widow and widower, whose estate is also called "dower." Applied in *Jennings v. Jennings*, 21 Ohio St. 56, to a will made in West Virginia by a resident of that state, in which the old rule then prevailed, so as to bar dower in Ohio lands. *Parker v. Parker*, 13 Ohio St. 95.

⁹⁵ Alabama, Code, § 1963; *Vaughan v. Vaughan*, 30 Ala. 329. Though the will turned out to be effective only to pass personal estate, still election called for. *Adams v. Adams*, 39 Ala. 274.

the will is deemed to take the place of dower, unless the contrary is clearly the testator's intention.

The New Jersey dower act has been very wisely construed as making the question whether the provisions of the will are in addition to or in place of dower one of intent, which is to be found from the whole context of the will; the result being that devises or bequests of considerable amount, reaching the bulk of the estate, or an undivided share of the whole, are generally taken to be in lieu of dower, and to bar it, if the will is assented to.⁹⁶

South Carolina has not legislated on the subject, and the old English rule may be regarded as still in force.⁹⁷

When the will on its face gives nothing to the widow, she need not, in some states, renounce it; but this exception is not known in Pennsylvania.⁹⁸

Opinions are divided on the question whether the acceptance of devises in the will bars the widow's dower in lands sold by the husband, or by process of law for his debts, during his lifetime. In Massachusetts, Ohio, and Illinois, the affirmative has been held, on the ground that the purchaser's loss might, through covenants in the deed or otherwise, fall back on the estate, or that the husband may have made the devise to protect the grantees. The contrary has been held in Michigan and in West Virginia, on the ground that the sale subject to dower very probably affected the price at which the land was bought.⁹⁹

⁹⁶ New Jersey, "Dower," § 16 (the words "in lieu of dower" are dispensed with); Griggs v. Veghte, 47 N. J. Eq. 479, 19 Atl. 807, where the older cases are reviewed; Stark v. Hunton, 1 N. J. Eq. 226 (rejecting the English rule); Norris v. Clark, 10 N. J. Eq. 51; Colgate v. Colgate, 23 N. J. Eq. 372; Brokaw v. Brokaw, 41 N. J. Eq. 304, 7 Atl. 414; Snook v. Snook, 43 N. J. Eq. 132, 12 Atl. 715.

⁹⁷ Picket v. Peay, *supra*, note 77; Hall v. Hall, 2 McCord, Ch. 269, 280.

⁹⁸ Cummings' Ex'r v. Daniel, 9 Dana (Ky.) 361; Martin v. Martin, 22 Ala. 86, and 35 Ala. 560. And so the husband gets curtesy when the wife's will becomes inoperative as to its devises by birth of afterborn children. Cunningham v. Cunningham, 30 W. Va. 599, 5 S. E. 139. Contra, *In re Cunningham's Estate*, 137 Pa. St. 621, 20 Atl. 714; s. p., Zimmerman v. Lebo, 151 Pa. St. 345, 24 Atl. 1082. In Scholl's Appeal (Pa.) 17 Atl. 206, the husband by qualifying under his wife's will as administrator c. t. a. was barred of his curtesy.

⁹⁹ Buffington v. Fall River Nat. Bank, 113 Mass. 24; Barnard v. Fall (1044)

Indiana has abolished dower, and substituted for it an estate in fee, in one-third, subject to some restrictions in favor of creditors and of stepchildren, which have been treated in the chapter on "Descent." Either wife or husband can elect between this and an analogous provision on the one hand and the benefits of the will on the other. As the statutory benefits are in the nature of heirship, an election on the side of the will bars all heirship, even as to lands not disposed of.¹⁰⁰

Where there is real dower an election to take under the will bars dower only in those lands which the will validly disposes of, not those which would lapse to the heir.¹⁰¹

The states which have abolished dower not only in name, but in effect, have to be treated separately.

Generally speaking, the widow has one election only, as to both lands and personalty; that is, though the statute secures to her both dower in the former and her distributable share in the latter (most of the states having gone back to the custom of London and of the province of York, securing the widow's share in the personalty against the power of bequest), she cannot choose one way between her dower and the devise of land, and the other way between her pars rationabilis and the bequests of personalty.¹⁰²

The result of a renunciation of a devise, is the same as the effect of a lapse; the land comprised in it goes as in case of intestacy.¹⁰³

It has been said that where the widow elects to stand by the will, giving up her dower, she takes her bequest as a purchaser, and need not contribute to make up deficiencies for the benefit of other lega-

River Sav. Bank, 135 Mass. 326 (purchase under execution in both cases); Haynie v. Dickens, 68 Ill. 267; Corry v. Lamb, 45 Ohio St. 203, 12 N. E. 660. Contra, Westbrook v. Vanderburgh, 36 Mich. 30; Shuman v. Shuman, 19 W. Va. 50.

¹⁰⁰ Indiana, Rev. St. § 2491 (and 2505). Anything taken by will is subject to debts. Miller v. Buell, 42 Ind. 482; Ragsdale v. Parrish, 74 Ind. 196 (wife accepting devise cannot share in estate undisposed of); nor in lapsed devise, Collins v. Collins, 126 Ind. 559, 25 N. E. 704, and 28 Atl. 190. For cumulative devise, see Burkhalter v. Burkhalter, 88 Ind. 368.

¹⁰¹ Bane v. Wick, 14 Ohio St. 505. Apparently the other way is In re Benson, 96 N. Y. 499.

¹⁰² Cauffman v. Cauffman, 17 Serg. & R. (Pa.) 16. See, also, Padfield v. Padfield, 78 Ill. 16, and the older Illinois decision when the statute affected only devises of land.

¹⁰³ Dean v. Hart, 62 Ala. 308; Devecom v. Shaw, 70 Md. 219, 16 Atl. 645.

tees. This could, of course, not apply where the will gives her an aliquot share of the whole estate; but it might give her a preference, and a better title to land, where the testator leaves a certain tract of land to his wife, and other tracts to other devisees. The matter seems not to have been passed on directly.¹⁰⁴ But the widow claiming against the will cannot insist that its directions for sale or investment work an equitable conversion for her benefit.¹⁰⁵

§ 141. Other Elections by Widow or Widower.

Jointures are settlements made by the husband upon the wife, out of his own estate, or out of the property which she brings to him, that are intended to take the place of dower, and to bar it. When a jointure is made before marriage and accepted by an adult bride, it is binding upon her. But if not accepted, or if she is an infant, or when the jointure is made after marriage, it is not binding upon the wife, and the same need for election arises upon it as upon the provisions of a will, though there is rarely any question as to whether it is given in lieu of or in addition to dower.¹⁰⁶

Again, in several states, especially in those of the far West, dower and curtesy have been entirely abolished, not only in name, as in Indiana, but in substance; a forced heirship being conferred on the wife in a stated part of the husband's lands, and on the husband in

¹⁰⁴ Isenthart v. Brown, 1 Edw. Ch. (N. Y.) 411; Reed v. Reed, 9 Watts (Pa.) 263; Lord v. Lord, 23 Conn. 327; Hickey v. Hickey, 26 Conn. 261. But the widow accepting is bound by her husband's contracts for conveyance. Hunkins v. Hunkins, 65 N. H. 95, 18 Atl. 655.

¹⁰⁵ Hoover v. Landis, 76 Pa. St. 354, 357; In re Cunningham's Estate, 137 Pa. St. 621, 20 Atl. 714.

¹⁰⁶ For statutes regulating jointure, see section on "Dower" under head of "Title by Marriage." And see statutes for electing between a jointure not binding in itself and dower or analogous rights: Massachusetts, Pub. St. c. 124, § 3; Maine, c. 103, § 9; Vermont, § 2219; Rhode Island, c. 229, § 23; New York, Rev. St. pt. 2, c. 1, tit. 3, § 12; New Jersey, "Dower," 12; Delaware, c. 87, §§ 3, 4; Kentucky, St. 1894, § 2136; Ohio, § 4189; Indiana, §§ 2500, 2504; Illinois, c. 41, § 9; Michigan, § 5749; Wisconsin, §§ 2170, 2172; Missouri, Rev. St. §§ 4528, 4529, 4531. See, also, provisions in laws of Virginia, West Virginia, New Hampshire, Connecticut, Arkansas, and Oregon. In New Hampshire, Vermont, Connecticut, Indiana, and Missouri the intent to bar dower must be expressed in the deed.

the lands of the wife, subject to the proper share of the debts. And, in some states, e. g. in Georgia and Missouri, the widow has an election between her common-law dower and her share of the inheritance. This election itself, as well as that between the will and her right of inheritance, raises questions which are but partially answered by the statutes.

Again, in a number of states the husband or wife, the owner of the homestead, cannot by his or her will take it from the survivor, and the election between this homestead right and other devises in the will stands on apparently the same footing as that between dower and provisions of the will; but the homestead right being given to the widow not only for her own benefit, but also for that of the minor children, the presumption is always against putting her to an election, just as it was with dower under the older English law.¹⁰⁷

Finally, in the states where the Spanish law of "community of goods" between husband and wife has been introduced, the devise of community lands by either party may lead to similar complications as in the case of dower.¹⁰⁸

A jointure "made before marriage without the wife's consent, or during her infancy, or after marriage," is, by the statute in most of the states, put on the same footing as a provision in the husband's will, as to election by the widow. A question can hardly ever arise whether it is intended to bar dower or is given in addition,—in fact, unless words are used indicating that the gift shall take the place of dower, the instrument would not be called a jointure.¹⁰⁹ The manner of election is generally the same as between

¹⁰⁷ And so as to minor children. *Lewis v. Lichty*, 3 Wash. St. 213, 28 Pac. 356.

¹⁰⁸ We refer to the section "Wife or Husband as Heir," in the chapter on "Descent," on that of "Dissolution of the Community," and to the sections on "Homestead," for the laws securing to the survivor these various rights. Thus the widow is put to her election when the husband devises community property. *Smith v. Butler*, 85 Tex. 126, 19 S. W. 1083.

¹⁰⁹ *Sheldon v. Bliss*, 8 N. Y. 31 (argu.). And the husband cannot turn a free gift into a jointure by calling it so in his will. *O'Brien v. Elliot*, 15 Me. 125 (the provision in lieu of dower may be given by a stranger, but the language of the gift must be clear); *Martien v. Norris*, 91 Mo. 465, 3 S. W. 849; *Mitchell v. Word*, 60 Ga. 531. But a jointure in money is of no effect till the money is paid. *Brenner v. Gauch*, 85 Ill. 368.

the will and dower; but the time is counted from the donor's death, as there is no other fit point of time to count from.¹¹⁰ A provision in money puts the widow to her election as much as a provision in land.¹¹¹ Where the law makes the widow an heiress of her husband, a jointure appearing on its face to be in bar of dower only does not deprive her of her right to take by descent.¹¹²

The election between dower and inheritable share is wholly statutory. In Massachusetts and Illinois the widow need not elect as against the share which descends to her in fee, dower being awarded in all cases, and a part of lands descends to the widow or widower in some cases, as it would to a kinsman.¹¹³ And thus, in Missouri, there is no necessity for the widow to elect between homestead and dower.¹¹⁴ In this state (and probably, in most others) the statutory rule which compels the widow to elect between dower and a devise within a given time, and presumes that the latter takes the place of the former, does not apply to the homestead, which the widow can hold though she has not renounced a will that gives it away.¹¹⁵ Where the widow dies without having chosen, and before her time has expired for election, between dower and child's part, it is held, in Georgia, that she is presumed to have chosen

¹¹⁰ Kentucky, Gen. St. c. 52, art. 4, § 6; St. 1894, § 2136; Massachusetts, c. 127, § 18; Maine, c. 65, §§ 4, 5, etc.; in most of the states close to sections named in note 106. Very few cases are reported under these statutes, and none, so far as we have found, in which the exact time of making the choice has come into question.

¹¹¹ No election between dower and a mere gift. *Sanford v. Sanford*, 58 N. Y. 68, 75; *Vincent v. Spooner*, 2 *Cush.* (Mass.) 467. In *Godbold v. Vance*, 14 S. C. 458, there was a deed made in lieu of legacy in a will previously made in lieu of dower. The widow had her choice between the three.

¹¹² *Sutherland v. Sutherland*, 69 Ill. 481. The additional right by descent was not enforced. The husband might have devised the widow's share as heiress to another. It is difficult to see how even express words in the jointure could have such an effect upon rights by descent, which are not "forced," since a bare expectancy is not assignable.

¹¹³ *Elliot v. Elliot*, 137 Mass. 116; Pub. St. Mass. c. 124, § 3 ("she may have, instead of such life estate, her dower in his real estate other than that taken by her in fee"); Illinois Rev. St. c. 39, § 1 (Third. "The other half * * * shall descend as in other cases").

¹¹⁴ *Gragg v. Gragg*, 65 Mo. 343.

¹¹⁵ *Kaes v. Gross*, 92 Mo. 647, 3 S. W. 840, overruling *Davidson v. Davis*, 86 Mo. 440. See, also, on this subject, *Dougherty v. Barnes*, 64 Mo. 159.

the more valuable, and her heirs will have the child's part, if it was worth more than her dower.¹¹⁶ And it was held in New Hampshire that a widow, having renounced the will in order to take dower, can still refuse dower and take her one-third in fee.¹¹⁷ In Colorado the share of one-half to the widow, given by the law of descent, is compulsory; and, if the will gives her less, she can renounce it.¹¹⁸ In the states in which "community of goods" takes the place of courtesy and dower (Texas, California, Washington, Idaho, Nevada, and Arizona), the husband cannot devise away the wife's part, nor the wife (even if she can make a will of her own) her husband's part. Hence, if there seems to be such a devise, and by the same will separate property is given to the wife or husband, a case of election arises.¹¹⁹ But, as the husband really owns only one-half of the property, which he manages, and which he can generally dispose of *inter vivos*, it is not to be supposed that he has more than one-half in his mind when he in his will deals with his estate. The impression of the testator that he is only a part owner is much stronger than that of a married man owning land in a common-law state; and it is therefore never presumed that a legacy or devise is in lieu of the other spouse's half in the community, or that a devise, in general words, is meant to pass more than the one-half which the testator or testatrix can lawfully dispose of.¹²⁰

In some states the homestead right of the surviving widow cannot be taken from her by will, but she must elect between it and other provision made for her therein;¹²¹ and in Iowa the thirds of the widow (which go to her in fee) are to include the homestead; and the statute is construed so as to make her choose between the home-

¹¹⁶ *Sloan v. Whitaker*, 58 Ga. 319. See a case of such election in *Missouri, Wigley v. Beauchamp*, 51 Mo. 549.

¹¹⁷ *Hall v. Smith*, 59 N. H. 315.

¹¹⁸ *Hanna v. Palmer*, 6 Colo. 156 (under St. § 2270). It is one-half subject to debts.

¹¹⁹ *Noe v. Splivalo*, 54 Cal. 207; *Morrison v. Bowman*, 29 Cal. 337 (argued).

¹²⁰ *Estate of Silvey*, 42 Cal. 210, following *Beard v. Knox*, 5 Cal. 252.

¹²¹ Homestead held without renouncing will, *Hubbard v. Russell*, 73 Ala. 578; but quære as to acceptance of devise, *Bell v. Bell*, 84 Ala. 64, 4 South. 189.

stead right, which belongs to her only during widowhood, and her distributive share in both lands and effects (or provision under the will). She naturally remains in the occupation of the homestead; but, as dower has been abolished, there is no quarantine *eo nomine*. The distributive share is deemed the natural choice; and a short and inevitable stay at the old homestead is not deemed an election in its favor. The widow must have time to investigate the assets and debts of the estate. But a stay of as much as a year might conclude her. Still more clearly would her giving a lease of the homestead. As long as she occupies it, and does not elect, she has no power to sell or mortgage her share of the other lands.¹²² Whether the election is to be made as against a devise is decided upon the same principles as in the case of dower.¹²³

In Vermont it is conceded that a devise may be so framed as to put the widow to her election as to the homestead as well as to dower; for it may be given "on condition that she will first surrender her homestead right." In this state the common-law rule still prevails, which, even as to dower, does not put the widow to her election unless the purpose of being in lieu of dower is clearly expressed.¹²⁴ And the rulings in other states will hardly require an election for or against the homestead under a devise which would not have put the widow to an election as to dower at common law, even where, in the absence of minor children, the descent or right of occupancy goes to the widow alone.¹²⁵

In several states in which the widow takes as heir a share in the real as well as in the personal estate of her deceased husband, she

¹²² McDonald v. McDonald, 76 Iowa, 137, 40 N. W. 126; Mobley v. Mobley, 73 Iowa, 654, 35 N. W. 691. Contra, Thomas v. Thomas, 73 Iowa, 657, 35 N. W. 693; Egbert v. Egbert, 85 Iowa, 525, 52 N. W. 478. In Schlarb v. Holberbaum, 80 Iowa, 394, 45 N. W. 1051, the widow died in occupancy of the homestead, and nothing passed to her heirs.

¹²³ Larkin v. McManus, 81 Iowa, 723, 45 N. W. 1061 (a devise of one-third of home farm to the wife, two-thirds to a daughter, indicates clearly that the widow must elect between the devise and homestead).

¹²⁴ In re Hatch's Estate, 62 Vt. 300, 18 Atl. 814. The widow cannot, on pretense of waiving her homestead right, increase her share under a devise of the residue. Mintzer v. St. Paul Trust Co., 45 Minn. 323, 47 N. W. 973.

¹²⁵ Devise of "half of all I own" does not put the widow to an election, as the husband does not fully own the homestead. McGowan v. Baldwin, 46 Minn. 477, 49 N. W. 251.

has dower at her own choice (which is in its nature free from the husband's debts, and unaffected by his deed in which she has not joined). It is so in South Carolina. For greater certainty, that state has provided by statute that, by acceptance of her distributive share (which here includes the share of lands), the widow waives dower both in descended and in aliened lands.¹²⁶

§ 142. How Election is Made.

When it is determined that the widow or widower must elect between the will and dower or courtesy (or the widow between jointure and dower), the questions arise next: When and how must the election be made? What will estop the party? What election does the law make if the time should elapse without a formal choice? At common law no time was set in which the widow must elect between the will of her husband or a postnuptial jointure and her dower;¹²⁷ nor was any one formality prescribed which would bind her more than any other.¹²⁸ Either a deed of conveyance of the devised lands, or her assent to an allotment of dower, or her bringing her action of dower *unde nihil habet* would undoubtedly conclude her one way or the other; but little short of this would have any effect.¹²⁹ The widow often requires much time to consider how to choose, for a devise is always subject to the testator's debts. Dower at common law, and the statutory substitute in many states, is not only free from the husband's debts, but also from all incumbrances made during coverture in which the wife has not joined. Hence she ought to have time, that she may inform herself as to the value of the estate, and the amount of her deceased husband's debts.¹³⁰

¹²⁶ South Carolina, Civ. St. 1894, § 1900 (section 1797, Rev. St. 1882).

¹²⁷ Nor was the writ of dower *unde nihil habet* within the statute of limitations. For long-delayed elections, see *Wake v. Wake*, 1 Ves. Jr. 335 (three years); *Reynard v. Spence*, 4 Beav. 103 (five years).

¹²⁸ *McGowan v. Baldwin*, 46 Minn. 477, 49 N. W. 251.

¹²⁹ *Welch v. Anderson*, 28 Mo. 298.

¹³⁰ Hence the statutes in Connecticut and some other states (see next note) count the time for election from the closing of the list of claims. And see *Goodrum v. Goodrum*, *infra*, note 132, where the widow was allowed to retract because the executor had failed to furnish accounts, and cases below

To do justice as well to the widow as to other devisees and to creditors, most of our states have enacted laws indicating when and how the election shall be made, when and how the widow may renounce or "dissent from" the will, as set out in the note; some of the states actually prescribing the form of words for such dissent.¹⁸¹ Where these acts do not forbid it, or are not construed as forbidding it, the widow may estop herself by taking possession of the things devised, bequeathed, or settled in lieu of dower, and still more so by selling them, and thus disabling herself from restoring the status quo;¹⁸² but such action, to work such an effect, must be

passim. See, for extension of time beyond the statutory limit by order of a court of equity, *Grider v. Eubanks*, 12 Bush (Ky.) 510.

¹⁸¹ New York, Rev. St. pt. 2, c. 1, tit. 3, § 13 (one year from the husband's death, she must enter suit for dower, or take possession of dower lands); Vermont, Comp. Laws, § 2219, subd. 3 (eight months after probate of will or grant of administration, or such further time as court may allow); Connecticut, Gen. St. § 621 (within two months after expiration of time for filing claims against estate). Rhode Island (c. 229, § 23, and c. 182, § 11), Indiana (§ 2491), Illinois (c. 41, § 11), Michigan (§ 5825), Virginia (§ 2559), West Virginia (c. 78, § 11), Kentucky (Gen. St. c. 31, § 12; St. 1894, § 1404), Missouri (§ 4528), Alabama (§ 1964), and Florida (§ 1830) give one year from probate or grant of administration, which in Kentucky is counted from the final disposition of a will contest, if such there be. Wisconsin (§ 2172), Tennessee (§ 3251), and Oregon (§§ 2971, 2972) also allow 12 months from the husband's death. In Arkansas (§ 2584) she must within the year enter on dower land, or commence proceedings. Only six months from probate or grant of administration are allowed in Maine (c. 65, § 5), Massachusetts (c. 124, §§ 3, 9, and c. 127, § 18), New Jersey ("Dower," 16), Maryland (art. 93, §§ 291, 292, 296), North Carolina (§ 2108), and Mississippi (§ 4496). In Iowa (§ 2452), six months after notification by the parties in interest; and in some states the time runs only from a citation served on the widow. One month in Pennsylvania ("Dower," 6), Delaware (c. 87, § 6), and Ohio (§ 5963) one year, Kansas (c. 117, § 41) 30 days. Georgia gives the widow seven years in which to sue for dower, and thus to renounce the will. Code, § 1764 (4). The provision in the Compiled Laws of Nebraska allowing 12 months from the husband's death seems to have been dropped from the last Revision. Many of these laws relate to election against jointure as well as against the will. Ohio now by an act of May 8, 1894, gives the widow or widower one year from the service of citation wherein to elect.

¹⁸² *McCallister v. Brand*, 11 B. Mon. 370 (case of distributable share, making will of devised property not a binding election); *Beem v. Kimberly*, 72 Wis. 343, 365, 39 N. W. 542; *Thompson v. Hoop*, 6 Ohio St. 481; *Stockton v. (1052)*

done with full knowledge of all the facts, or at least with opportunity for such knowledge.¹⁸³ And it must be unequivocal. Thus it has been held, that where the widow accepts a sum of money from the executor, which he professes to pay on account of bequests in the will, or as rents of devised lands, this would not commit her to stand by the will, if the sum did not exceed her claim on account of dower and distributive share.¹⁸⁴ Or if she holds possession for a few weeks, or for a few months, of property devised or bequeathed, though it should exceed her rights as dowress or as forced heiress, it will not conclude her if she can restore the property, and is willing to do so, when she acquires full knowledge of her true interest.¹⁸⁵

Indiana and Iowa alone require an assent to the will; so that a failure to assent is in itself a renunciation. The statutes of the other states give effect to the will, and defeat dower, unless an elec-

Wooley, 20 Ohio St. 184 (possession without election by record for a number of years binding on both parties); Cauffman v. Cauffman, 17 Serg. & R. 24 (before the statute; followed in Light v. Light, 21 Pa. St. 407, election can be made otherwise than in the prescribed form; not in all states); Clark v. Middlesworth, S2 Ind. 247 (sale); Stoddard v. Cutcompt, 41 Iowa, 329 (receipt of legacy); Stephens v. Gibbes, 14 Fla. 331; Cooper v. Cooper's Ex'r, 77 Va. 198 (delay of 4½ years, and afterthought on account of fall in price); Goodrum v. Goodrum, 56 Ark. 532, 20 S. W. 353 (receiving money, though giving no receipt).

¹⁸³ Duncan v. Duncan, 2 Yeates (Pa.) 302; Anderson's Appeal, 36 Pa. St. 476; Bradfords v. Kents, 43 Pa. St. 481; Kreiser's Appeal, 69 Pa. St. 191; Elbert v. O'Neil, 102 Pa. St. 302; U. S. v. Duncan, 4 McLean, 99, Fed. Cas. No. 15,002 (where an election made without full knowledge was set aside even after possession of years); Reaves v. Garrett's Adm'r, 34 Ala. 558; Goodrum v. Goodrum, *supra*. Hence a widow is not bound by a premature election, where the executor has failed to file inventory and accounts. Stone v. Vandermark, 146 Ill. 312, 34 N. E. 150 (widow relieved against acceptance, where the will misrecites value of bequest). Hastings v. Clifford, 32 Me. 133.

¹⁸⁴ Millikin v. Welliver, 37 Ohio St. 460; Bradfords v. Kents, *supra*. Continuing to occupy husband's land beyond quarantine is not an election. In re Nagel (Surr.) 12 N. Y. Supp. 707; Beem v. Kimberly, 72 Wis. 343, 365, 39 N. W. 542 (receiving some money); Sill v. Sill, 31 Kan. 248, 1 Pac. 556 (short possession of lands); Phelps v. Phelps, 20 Pick. 556 (retaining husband's house). A fortiori, an election made on condition can be retracted when the condition is not fulfilled. Richart v. Richart, 30 Iowa, 465. Contra, see a case of estoppel by long-continued possession. Gough v. Manning, 26 Md. 347.

¹⁸⁵ Herr v. Herr (Iowa) 58 N. W. 897.

tion is made within the time prescribed.¹³⁶ It has been repeatedly held in Iowa that nothing short of a formal entry of the election in the proper court is effective to entitle the widow (or widower) to the devise.¹³⁷ And it has been held in Missouri that no act in pais will bind the widow to take the devise, and that there is no way of electing in its favor except by allowing the time for taking dower to elapse.¹³⁸ And where the widow dies before the time for election expires, without taking that step, her heirs and representatives are bound by her action, and they are entitled to any resulting benefit; as the right to elect is personal and dies with her.¹³⁹ Where the widow has written out and signed her election, it has been held, in Alabama, that her death before it reaches the proper office does not avoid it; in Michigan, that it does.¹⁴⁰ And the right, being personal, cannot be exercised by a judgment or execution creditor. An insolvent widow (or widower) has the right to elect the less valuable estate.¹⁴¹

¹³⁶ Pratt v. Felton, 4 Cush. 174; Ex parte Moore, 7 How. (Miss.) 665; Collins v. Melton, 40 Miss. 242; Wilson v. Fridenberg, 21 Fla. 386.

¹³⁷ Houston v. Lane, 62 Iowa, 291, 17 N. W. 514; Baldozier v. Haynes, 57 Iowa, 683, 11 N. W. 651. But the widow need not "accept" the will where it gives her the whole estate. Bulfer v. Willigrod (Iowa) 33 N. W. 136. The change from the rule in the old to that in the new law is pointed out in Kyne v. Kyne, 48 Iowa, 21. A suit to enforce the will is an election. Ashlock v. Ashlock, 52 Iowa, 319, 1 N. W. 594, and 3 N. W. 131.

¹³⁸ Bretz v. Matney, 60 Mo. 444 (though the will on its face called for acceptance). But see note 129. And the election cannot be avoided, because it was filed in a county court, which took, but ought not to have taken, jurisdiction of the estate. Crawford v. Wolfe, 103 Mo. 391, 15 S. W. 426. The limit of one year is imperative. Gant v. Henly, 64 Mo. 162. Even where the written election accidentally missed reaching the office in time, it could not be supplied. Allen v. Harnett, 116 Mo. 278, 22 S. W. 717.

¹³⁹ Boone v. Boone, 3 Har. & McH. (Md.) 95; Douglass v. Clarke, 4 Dessaus Eq. (S. C.) 143 (the dower in that state being one-third in fee); Donald v. Portis, 42 Ala. 29; Baxter v. Bowyer, 19 Ohio St. 490 (election made out of court held binding on representatives); Crozier's Appeal, 90 Pa. St. 384; Welch v. Anderson, 28 Mo. 298; Sherman v. Newton, 6 Gray (Mass.) 307; Jackson's Appeal, 126 Pa. St. 105, 17 Atl. 535. But where the widow, being near death, elected before probate, it was held good under a law requiring an election within 12 months after probate. Atherton v. Corliss, 101 Mass. 40.

¹⁴⁰ McGrath v. McGrath, 38 Ala. 246. Contra, Church v. McLaren, 85 Wis. 122, 55 N. W. 152.

¹⁴¹ Shields v. Keys, 24 Iowa, 298.

A contract between the widow and heirs to elect in a particular way will not be specifically enforced in equity when no property has changed hands; and a sealed instrument, made by the widow, not in the statutory form, nothing having been paid on it, has been disregarded as a nudum pactum.¹⁴²

An election made before the husband's death is of no avail for several reasons: First, because in most states no executory contract can be made between husband and wife; secondly, because inchoate dower can only be released to a grantee; thirdly, because it is unknown to the statutes on election.¹⁴³

An election once formally made is in the nature of an executed conveyance, and, though resulting from mistake or fraud, can only be set aside by the judgment of a court with equity powers. It cannot be simply disregarded.¹⁴⁴ The relief in equity can be granted only on the ordinary terms of rescission; that is, the restoration of the property or money obtained under the election (*in pais* or by record) which the widow seeks to have set aside.¹⁴⁵ But courts of equity have been very liberal in relieving the widow against the results of an imprudent election, especially where the devisees or executor used any persuasion with her, which might have led her into an election against her interest, or hurried her into choosing before she had time to become acquainted with all the facts; though in this matter, as well as in others, the courts of nearly every state (unless it be Kentucky) would hold her to a knowledge of the law, which defines dower and distributive share, and secures her the right to elect.¹⁴⁶ If "no harm has been done," especially, the courts are apt to relieve the widow against her imprudent act.¹⁴⁷

¹⁴² Smart v. Waterhouse, 10 Yerg. (Tenn.) 94; Ward v. Ward, 134 Ill. 417, 25 N. E. 1012.

¹⁴³ Anderson's Appeal, *supra*; Wilber v. Wilber, 52 Wis. 298, 9 N. W. 163. The very odd decision in Lively v. Paschal, 35 Ga. 218, will hardly be drawn into precedent against this position.

¹⁴⁴ Davis v. Davis, 11 Ohio St. 386; In re Slauson's Estate, 82 Iowa, 366, 48 N. W. 87.

¹⁴⁵ Adams v. Adams, 39 Ala. 274 (inability to restore); Stephens v. Gibbes, 14 Fla. 331 (long delay and heavy losses).

¹⁴⁶ Evans' Appeal, 51 Conn. 435, where the widow had, on the executor's suggestion, renounced the will.

¹⁴⁷ Macknet v. Macknet, 29 N. J. Eq. 54; Yorkly v. Stimson (N. C.) 1 S. (1055)

None of the states extend the time for election by reason of the widow's infancy or the unsoundness of her mind, and the courts have not undertaken to supply this defect, understanding that a quick settlement of estates is the object of the statute.¹⁴⁸ Some of the statutes provide expressly for these cases of disability. Thus in Kentucky an infant widow is authorized to elect. Alabama directs how an election shall be made for an insane widow, and so in some other states.¹⁴⁹ In the absence of these statutes it has generally been held that the election is for the pecuniary benefit of the widow, and that it therefore does not lie in the mouth of the opposite party to raise a question about her incapacity;¹⁵⁰ but the supreme court of Massachusetts takes the ground that a widow may wish to elect for the benefit of the children or creditors; that her act must be free; if she is insane she cannot elect, and the will stands.¹⁵¹ As a general rule, courts of equity will not undertake to extend the statutory time, and the probate court has no power to do so, notwithstanding the difficulty the widow may have in arriving at the proper state of facts;¹⁵² but in Tennessee the statute (which has been enlarged by construction) fixes no limit when the estate is insolvent.¹⁵³

E. 452, where the widow took possession of the land, and spent the money bequeathed in improving it; an extreme case. *Goodrum v. Goodrum*, supra, note 132, where some lots had been sold, additional dower allotted out of remaining lots.

¹⁴⁸ Kentucky, section supra; Alabama, Code, § 1965.

¹⁴⁹ *Collins v. Carman*, 5 Md. 503, 516.

¹⁵⁰ *Young v. Young*, 1 A. K. Marsh. (Ky.) 562; *Kennedy v. Johnston*, 65 Pa. St. 451 (committee can elect, but only under advice of the court); *Van Steenwyck v. Washburn*, 59 Wis. 483, 17 N. W. 289 (court will elect for insane widow); *In re Andrews' Estate*, 92 Mich. 449, 52 N. W. 743 (committee can choose for widow. It is an assertion, not a waiver). *Brown v. Hodgdon*, 31 Me. 65, is put on weaker grounds, such as failure to retract in lucid interval.

¹⁵¹ *Pinkerton v. Sargent*, 102 Mass. 570. And so in Indiana it was held that the guardian or committee cannot elect for her. *Heavenridge v. Nelson*, 56 Ind. 90.

¹⁵² *Steele v. Steele*, 64 Ala. 438.

¹⁵³ *Jarman v. Jarman*, 4 Lea, 671. The statute speaks only of a provision in personality, but here was a devise of land.

CHAPTER XIII.

JUDGMENTS AFFECTING LAND.

- § 143. Conclusiveness of Judgments.
- 144. Actual Notice.
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- 153. Sale for Division.
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- 158. Retrospective and Private Laws.
- 159. Parties and Privies.
- 160. Pendente Lite Purchasers.

§ 143. Conclusiveness of Judgments.

A title to land must often be traced through the judgment of a court. Indeed, we have seen that, aside from New York and New Jersey, every will is, both as to lands and as to chattels, merged in the order of probate, as far as the question of its execution or revocation is concerned. But more directly from the judgment of a court are derived the titles of those who buy land under execution, or at decretal sales, or who obtain the strict foreclosure of a mortgage, or to whom land is conveyed by the commissioner of a court under its decree, or to whom it is allotted in the way of partition or as dower. All such persons have to look to two sets of circumstances: one to determine whether the judgment under which they claim is valid; the other, whether it has been carried out in the way prescribed by law. They need not look behind the judgment to find whether it is just, either in the facts upon which it is grounded or in its conclusions of law. The party claiming rights under a judgment is not concerned about any errors in the judgment, provided he derived his rights

while it was neither superseded nor reversed nor annulled nor vacated by direct proceedings for that purpose. But if the judgment be void for want of jurisdiction, all titles derived from it fall with it as soon as such voidness is made to appear.¹ As simple as these principles appear, there is much difficulty in applying them, and a great deal of disharmony between the courts of the several states, and between these and the federal tribunals.² With the binding force of judgments rendered in sister states we have but little to do, as these serve in most cases only as evidences of debt; yet a decree of divorce, an order of adoption, a judgment dissolving a corporation, all of which work on status, may readily affect the title to land in other states.³

¹ The works of Black on Judgments and Freeman on Judgments, the last edition of the latter being published in 1892, also his monograph on Void Judicial Sales (1886), and Judge Van Fleet's work on Collateral Attack (1892), may be consulted on this subject. The latter is full and impartial enough in his citation of authorities, but denounces as wrong almost every case in which the collateral attack on a judgment is successful. On judgments of courts of limited jurisdiction much is found in the English and American notes on Crepps v. Durden, 1 Smith, Lead. Cas. 800; on the question who is bound by a judgment, in the like notes to the Duchess of Kingston's Case. A list of 140 cases reported before 1869 is found in the argument of Hahn v. Kelly, 34 Cal. 391. Leading American cases are Elliott v. Piersol, 1 Pet. 328, and Thompson v. Tolmie, 2 Pet. 157. How far a former judgment determines a title against the pretension that new questions are raised upon it has been lately discussed by the supreme court of the United States in Dowell v. Applegate, 152 U. S. 327, 14 Sup. Ct. 611, referring to Cromwell v. County of Sac, 94 U. S. 351; Russell v. Place, Id. 606; Bissell v. Spring Valley Tp., 124 U. S. 225, 8 Sup. Ct. 495, and several other cases generally not affecting the title to land.

² The supreme court has openly avowed its unwillingness to follow the state precedents on this subject. "In some instances the states have provided for personal judgments against nonresidents without personal citation, on a mere constructive service, etc., but the federal courts have not hesitated to hold such judgments invalid. Pennoyer v. Neff, 95 U. S. 744. So, on the other hand, if the local court should hold that certain conditions must be performed before jurisdiction is obtained, and thus defeat rights of nonresident citizens, acquired when a different ruling prevailed, the federal courts would be delinquent in their duty if they followed the later decision." Mohr v. Manierre, 101 U. S. 417, 422,—in which case they disregard the Wisconsin decision in Mohr v. Tulip, 40 Wis. 66.

³ Borden v. Fitch, 15 Johns. 121, where the supreme court of New York (1058)

A judgment is void when the court that rendered it lacked jurisdiction either of the person or of the subject-matter. If it appears from the record that the defendant has never been notified, and has not appeared, there is no jurisdiction of the person; if a court having jurisdiction only in causes involving no greater value than \$500 should render judgment for \$1,000, or, having jurisdiction only between citizens of different states, should render judgment in favor of one citizen of New York (so designated in the record) against another citizen of that state (likewise so designated), the judgment would be void. But the questions arising in courts are seldom so plain. Generally there is some attempt to bring the defendant before the court, or some pretense that he has been brought or has come in. The judgment rendered under such circumstances may be deemed only erroneous, not void; and the defendant has no redress, except by appeal or review. In some states, he cannot with impunity look on while his land is sold, regarding the proceedings as void and harmless, while in other states this course may be successful.

Again, a distinction is often made between "superior courts," which have an unlimited jurisdiction in law and equity (like the former king's bench and common pleas in England, and the circuit courts in most of the Western and Southern states) on the one side, and courts of a limited and peculiar jurisdiction on the other, such as orphans' or probate courts; presumptions being indulged in favor of the former, but not in favor of the latter. And again, in the same court distinctions are made between actions, carried on in law or equity in the regular way, and special proceedings, such as those flowing from the power of the state, as *parens patriæ* over the interests of infants, of those of unsound mind, or of unborn remaindermen, and indeed all statutory proceedings, foreign to the ways of the common law.⁴ Again, this old distinction between higher and

disregarded a decree of divorce granted by the supreme court of Vermont without any process against or appearance of the defendant, is the leading case. It had, however, no bearing on a land title. And so the judgment of a home court in dissolving a corporation may affect property rights elsewhere. *Folger v. Columbian Ins. Co.*, 99 Mass. 267,—where such judgment was held void.

⁴ It is thus stated in *Galpin v. Page*, 18 Wall. 350: "A superior court of

lower courts is in some states almost wiped out, because all permanent courts, especially courts of probate, are deemed courts of record, and "superior" within their prescribed limits. In many states they are treated more benignly than the circuit courts, thus leaving the doctrine about inferior courts to work upon hardly any but temporary courts, and half-judicial boards.⁵ The distinction between a

general jurisdiction, proceeding within the general scope of its powers, is presumed to have jurisdiction to give the judgment it renders until the contrary appears, and this presumption embraces jurisdiction not only of the cause or subject-matter of the action in which the judgment is given, but of the parties also. The rule is different with respect to courts of special and limited authority. Their jurisdiction must affirmatively appear by sufficient evidence, proper averments in the record, or their judgments will be deemed void on their face." Syllabus, and pages 365, 366. In Indiana the cases of Sims v. Gay, 109 Ind. 501, 9 N. E. 120, and Royse v. Turnbaugh, 117 Ind. 539, 20 N. E. 485, take strong ground for presumption in favor of a superior court. The leading English case on the distinction between courts is Peacock v. Bell, 1 Saund. 74. It says: "Nothing shall be intended (i. e. presumed) to be out of the jurisdiction of a superior court, but that which specially appears to be so, and nothing shall be intended to be within the jurisdiction of an inferior court but that which is so expressly alleged." See, as to recital of jurisdictional facts on the record, Dyckman v. Mayor, etc., of New York, 5 N. Y. 434.

⁵ The courts of ordinary in Georgia are now considered of "original and general," not of limited, jurisdiction, Davie v. McDaniel, 47 Ga. 195 (and so made by statute); and many states declare as to their probate courts that they are superior. See cases in section on "Administrator's License" hereafter. In Evansville R. Co. v. City of Evansville, 15 Ind. 395, it was held that the express decision, even of an inferior court, as to the existence of the facts giving jurisdiction is conclusive; and this was admitted by court and counsel in Board of Com'rs v. Markle, 46 Ind. 96, 105, as to a special board for fixing the county seat. The old rule against "limited" jurisdiction was applied in New Jersey to a "board of chosen freeholders" for laying out a byroad. Perrine v. Farr, 22 N. J. Law, 356. The county court in Illinois, as probate court, though "limited," was never deemed an inferior court. Propst v. Meadows, 13 Ill. 157. It is laid down by Freeman on Judgments as the rule supported by the weight of authority that a superior court is presumed to have jurisdiction over the person unless the record shows affirmatively that there has been no notice or appearance. Murchison v. White, 54 Tex. 78. The probate court in Indiana has always held the rank of a superior court. Dequindre v. Williams, 31 Ind. 354, and in Illinois an order of administration cannot be assailed on an outside showing that the decedent's home was in another county than the record recites. Bostwick v. Skin-

"court proceeding according to the methods of the common law" and the same court proceeding otherwise, as to the weight of presumption in its favor, has been much shaken; yet it seems still to be recognized so far in New York that a landowner, whose lot had been condemned by the county judge for railroad purposes, was allowed to show in an ejectment suit that the facts giving authority for condemnation did not exist.⁶ The United States court sitting in the same district with the state court is deemed a domestic court, not like the court of a sister state.⁷ Again, a distinction has been made between suits in personam and suits in rem. In the former the parties in interest opposed to the applicant or petitioner are named as defendants, and notice must be brought home to them in the manner pointed out by the law. In the latter "the whole world" is the opposite party. There must be some act carrying notice in a general way to whom it may concern, who may thereupon come forward

ner, 30 Ill. 147. And so in Ohio with the probate court in all its branches of jurisdiction. "The distinction is not between courts of general and those of limited jurisdiction, but between courts of record, that are so constituted as to be competent to pass on their own jurisdiction," etc. (Sheldon v. Newton, 3 Ohio St. 494,) which is really a vicious circle, approved in Railroad Co. v. Village of Belle Centre, 48 Ohio St. 273, 27 N. E. 464. So, also, Fitzgibbon v. Lake, 29 Ill. 165; Schnell v. Chicago, 38 Ill. 384. And so the orphans' court in New Jersey. Den v. Hammel, 18 N. J. Law, 73. The California act of 1863 expressly declared the probate courts to be of record, and superior; and so held in Illinois. Bostwick v. Skinner, 80 Ill. 147.

⁶ Hahn v. Kelly, 34 Cal. 391 (service by publication. The court rejects the distinction—the whole practice of the state being under a Code—as obsolete); quoted in Newcomb v. Newcomb, 13 Bush, 544. It is, however, recognized in Galpin v. Page, 18 Wall. 350; Gridley v. College of St. Francis Xavier, 137 N. Y. 327, 33 N. E. 321; as to condemnation, in Adams v. Saratoga & W. R. Co., 10 N. Y. 328; as to power given to "the chancellor" in a private act, in Williamson v. Berry, 8 How. 495. In most of the Western states, as to proceedings in probate court for sale of lands, the jurisdiction is favored, though the forms are new and summary. Decisions on the character of these courts will be found under the sections on "Administrator's License" and "Sale of Infant's Land."

⁷ Turrell v. Warren, 25 Minn. 9; Thompson v. Lee Co., 22 Iowa, 206; Hughes v. Davis, 8 Md. 271; Town of St. Albans v. Bush, 4 Vt. 58; Earl v. Raymond, 4 McLean, 233, Fed. Cas. No. 4,243. A state court could reject a bankruptcy record under act of 1841 for want of local jurisdiction in the district court; perhaps not under the act of 1867.

to make their adversary claims. Such are proceedings looking towards confiscation under the revenue laws, and such were the proceedings under the non-intercourse act during the Civil War. Such are also the proceedings by which the administrator in some of the states obtains the license of the court to sell the decedent's lands for the payment of debts. Again, there are *ex parte* proceedings; for instance, a guardian may, in some states, obtain the advice and leave of the probate court for the sale of his ward's land, without any notice, either personal or general.⁸

While judgments in *rem* are binding on all the world, judgments which are not so in the strictest sense of the word are binding only upon those who are parties to the proceeding and upon privies; that is, upon those who claim under the parties by purchase or descent after the commencement of the suit. An action to foreclose a mortgage or to enforce it by sale, though it operates upon the *res*, is a proceeding against the defendants named therein, and is not binding upon others.⁹ A confiscation of property under the act of congress of July 17, 1862, was not strictly in *rem*, for the most essential fact alleged by the government was that the property sought to be confiscated was owned by a named person, who had committed the offense, to be punished by loss of property.¹⁰ In some states land can be sold for taxes only by the judgment of a court, which is generally obtained in a very summary way. Now these proceedings, under some statutes, are strictly in *rem*,—i. e. the tax bill is made out against the tract or lot which is primarily bound for the tax, and the proceedings follow the tax bill, the name of the supposed owner being immaterial,—while under other laws the proceeding is of the same nature as a suit to enforce a contract lien; it is binding only upon the parties named as defendants.¹¹ It is sometimes a matter

⁸ It will be seen that there is considerable discrepancy, on the subject of these guardians' sales, between state and federal courts, the latter upholding them in cases where the state courts do not.

⁹ *Watson v. Spence*, 20 Wend. 260, 262. It is a familiar rule that a junior mortgagee may redeem, either after a strict foreclosure, or after a judicial sale obtained in a suit to which he is not made a party.

¹⁰ *Windsor v. McVeigh*, 93 U. S. 274. See, also, *McVeigh v. U. S.*, 11 Wall. 259.

¹¹ *Brady v. Burke*, 90 Cal. 1, 27 Pac. 52; *Wood v. Brady*, 150 U. S. 18, 14 Sup. Ct. 6,—the question being whether a statutory suit for street assessments
(1062)

of dispute whether an attack upon a judgment is direct or collateral. It will be seen, in going through the cases cited in this chapter, that the attack upon the rights of a stranger, who has bought under an execution or judicial sale, is always deemed "collateral." Indeed, whenever the suit is not shaped, in the main, as a proceeding to reverse, vacate, or set aside the judgment, such suit—also any defense which professes to ignore the judgment—is collateral.¹² Though a record may, with leave of court, be amended at any time to conform to the truth and to sustain the validity of judgments, it must be done in the cause and court in which it was made up. In a collateral proceeding nothing but the final and formal entry of the judgment can be looked to,—not any memoranda of the judge or minutes of the clerk.¹³

Aside of the ordinary grounds of lack of jurisdiction over the person or the subject-matter, an entry of record which purports to be a judgment may also be a nullity because the man or the body which awarded or pronounced it was not in fact a judge, or not a lawful court (there can be no *de facto* court);¹⁴ or because such pretended judgment was rendered on a *dies non juridicus*, for instance, under the mistaken belief that it was then term time, when it was in fact vacation;¹⁵ or because the case had been removed from the court in which it is entered before the time of such entry, either under the acts of congress for the removal of causes, or by appeal or

was in rem, so as to bind all persons, or in personam, so as not to bind purchasers or lien holders not made parties.

¹² *Morrill v. Morrill*, 20 Or. 96, 25 Pac. 362 (plain case); *Brittain v. Mull*, 99 N. C. 483, 6 S. E. 382 (where part owner bought under decree; attack on decree, and sale was held direct).

¹³ *Elliott v. Plattor*, 43 Ohio St. 198, 1 N. E. 222; *Fall River v. Riley*, 140 Mass. 488, 5 N. E. 481. Rightfulness of amendments of the record cannot be gainsaid in collateral proceedings. *Hamilton v. Seitz*, 25 Pa. St. 226. *Contra*, *Johnston v. San Francisco Sav. Union*, 75 Cal. 134, 16 Pac. 753. A judgment regularly entered not rendered null by a subsequent order of continuance. *Claggett v. Simes*, 31 N. H. 56.

¹⁴ *Hildreth's Heirs v. McIntire's Devisee*, 1 J. J. Marsh. (Ky.) 206. But the ordinary judgments in the courts of the seceded states during the Rebellion have been recognized after the war, both by the reorganized state courts and by the United States courts. *Horn v. Lockhart*, 17 Wall. 570; *Allen v. Kel-lam*, 69 Ala. 442.

¹⁵ *Robinson v. Ferguson*, 78 Ill. 538.

writ of error.¹⁶ We may state, further, that the old notion as to intendment against the jurisdiction of limited or inferior courts, which originated in England in the jealousy of the common lawyers, against ecclesiastics and civil lawyers, on the one hand, and against borough privileges, on the other, is receding more and more. Very little of it is left in American jurisprudence.¹⁷

Where a superior court has jurisdiction of the person, by notice served upon him, and of the subject-matter, the judgment rendered cannot be impeached as void because the form of the proceeding was misconceived,—e. g. that a scire facias was sued out instead of bringing an ordinary action, or that the proceeding was at law instead of being in equity,—for this is one of the questions which the court must necessarily decide in the course of the suit.¹⁸ Judgments have been collaterally attacked upon the ground that the judge holding the court was unlawfully put into office, or was disqualified by failure to take the oath of office, or by residence out of the district, or by kinship to a party on the record or in interest, or by having been of counsel, or that he was absent from the court or the county, or interested in the result; such attack being often successful. The discussion of the authorities on this subject, many of which we subjoin, would lead us too far from our subject. Many of the cases are of direct interest, especially those dealing with judges of probate.¹⁹

¹⁶ *Brady v. Burke*, 90 Cal. 1, 27 Pac. 52. Contra where the appeal or writ of error is itself void. *Home of Inebriates v. Kaplan*, 84 Cal. 488, 24 Pac. 119.

¹⁷ *Alexander v. Gill*, 130 Ind. 485, 30 N. E. 525 (justice passing on his own jurisdiction as to freehold); *Thomas v. Churchill*, 84 Me. 446, 24 Atl. 899 (where presumption was given in favor of a board of county commissioners).

¹⁸ *Insley v. U. S.*, 150 U. S. 512, 14 Sup. Ct. 158. And a judgment on scire facias is as conclusive as any other (if upon actual notice). *Ellis v. Jones*, 51 Mo. 181; *Wood v. Ellis*, 10 Mo. 382. *Lavell v. McCurdy's Ex'rs*, 77 Va. 763, to the contrary, stands alone.

¹⁹ See the treatise of Judge Van Fleet on "Collateral Attack" (sections 22-28 and 34-57). Among the cases quoted by him which sustain the acts of an unlawful judge are *Taylor v. Skrine*, 3 Brev. (S. C.) 516; *Blackburn v. State*, 3 Head (Tenn.) 689; *Campbell v. Com.*, 96 Pa. St. 344; *Mallett v. Uncle Sam Gold & Silver Min. Co.*, 1 Nev. 188; *Littleton v. Smith*, 119 Ind. 230, 21 N. E. 886 (special judge); *Rogers v. Beauchamp*, 102 Ind. 33, 1 N. E. 185; *State v. Bloom*, 17 Wis. 521; *In re Burke*, 76 Wis. 357, 45 N. W. 24; *Hunter's Adm'r v. Ferguson's Adm'r*, 13 Kan. 462; *Higby v. Ayres*, 14 Kan. 331; *Read v.*

Excepting judgments in rem (such as the appointment of an administrator, and, outside of New York and New Jersey, the probate or rejection of a will), judgments are not binding on any one but parties and privies. It is well known that the creditor of a defendant may assail a judgment recovered against him, as collusive and fraudulent. The statutes on fraudulent conveyances say so in express terms. Among the parties bound are not only those to the record, but the real parties in interest,—those who caused a suit

City of Buffalo, 4 Abb. Dec. (N. Y.) 22, and Hamlin v. Kassafer, 15 Or. 456, 15 Pac. 778, and Carli v. Rhener, 27 Minn. 292, 7 N. W. 139 (judge holding over); Babcock v. Wolf, 70 Iowa, 676, 28 N. W. 490, and Guthrie v. Guthrie, 71 Iowa, 744, 30 N. W. 779 (term expired before decision reaches clerk); Ball v. U. S., 140 U. S. 118, 11 Sup. Ct. 761 (district judge in other district); Stearns v. Wright, 51 N. H. 600, and Floyd Co. v. Cheney, 57 Iowa, 160, 10 N. W. 324 (of counsel); Phillips v. Eyre, L. R. 6 Q. B. 1, and Dimes v. Grand Junction Canal Co., 3 H. L. Cas. 759, 16 Eng. Law & Eq. 63, and State v. Lewis, 73 N. C. 138, and Smith v. Mayo, 83 Va. 910, 5 S. E. 276, and Price v. Springfield Real Estate Ass'n, 101 Mo. 107, 14 S. W. 57, and In re Hancock, 91 N. Y. 284 (judge interested); Holmes v. Eason, 8 Lea, 754, overruling earlier Tennessee cases; Eastwood v. Buel, 1 Ind. 434; Rogers v. Felker, 77 Ga. 46; Fowler v. Brooks, 64 N. H. 423, 13 Atl. 417; Hine v. Hussey, 45 Ala. 496; Koger v. Franklin, 79 Ala. 505, and Posey v. Eaton, 9 Lea, 500, and Gear v. Smith, 9 N. H. 63 (judge related; last-named case important to land titles); Pratt v. Stocke, Cro. Eliz. 315 (not qualified); Denning v. Norris, 2 Lev. 243; Pepin v. Lachenmeyer, 45 N. Y. 27 (official oath); Landon v. Comet, 62 Mich. 80, 28 N. W. 788 (judge of wrong court); Lanning v. Carpenter, 23 Barb. 402 (judge absent). And, in Campbell v. Com., supra, it was held that a writ of error from the judgment of a de facto judge is a collateral attack, and, as such, inadmissible. The acts of judges were held void in the following cases: Capper v. Sibley, 65 Iowa, 754, 23 N. W. 153 (judge outside of his county); White v. Riggs, 27 Me. 114 (at private house); Mitchell v. Adams, Posey, Unrep. Cas. 117; Glasgow v. State, 9 Baxt. (Tenn.) 485; Dansby v. Beard, 39 Ark. 254; Greshan v. Ewell, 84 Va. 784, 6 S. E. 134 (special judge); Chicago & A. Ry. Co. v. Summers, 113 Ind. 10, 14 N. E. 733; Bates v. Thompson, 2 D. Chip. (Vt.) 96; Chambers v. Hodges, 23 Tex. 104; Price v. Dewhurst, 8 Sim. 279, 305 (direct interest); Sigourney v. Sibley, 21 Pick. 101; Blanchard v. Young, 11 Cush. 341 (indirect interest); Dawson v. Wells, 3 Ind. 398; Chambers v. Clearwater, 40 N. Y. 310; People v. Dela Guerra, 24 Cal. 73; Birdsall v. Fuller, 11 Hun, 204; Hall v. Thayer, 105 Mass. 219 (judge related; last case important, being appointment of administrator); Ferguson v. Crittenden Co., 6 Ark. 479 (no quorum); Morgan v. Hammett, 23 Wis. 30 (other judge where proper one not disqualified).

to be brought or defended.²⁰ The cestui que trust is often bound by the judgment against his trustee. But this matter can be discussed fully only in a work on equity. How far purchasers, pending suit, but before judgment, are bound, will be shown hereafter; also how far privies in estate—that is, the holders of future, and especially of uncertain estates—are bound by judgments dividing land in kind, or selling it for reinvestment.²¹

The main topics arising from the effect of judicial proceedings on the title in land, to be treated in this and the next chapter, are the following:

First. The validity of judgments requiring or resting on actual notice, or on appearance, and the right to controvert such notice or appearance.

Second. Constructive service, such as is had in proceedings in rem or quasi in rem, which is known in the several states under the name of "warning orders," "order of publication," "substituted service," etc.

Third. Proceedings against unknown heirs, unknown owners, or unknown creditors, which are of necessity carried on by constructive service.

Fourth. Proceedings by which guardians, executors, administrators, and committees are authorized to sell the lands of persons under disabilities, or of the estates intrusted to them, or in the course of which lands are sold for the supposed benefit of the owners, and not in the way of an adverse action under the common-law or equity powers of the court.

Fifth. Partition; sale of lands for "indivisibility," instead of partition; and allotment of dower.

Sixth. The jurisdiction of courts as it depends on the subject-matter and citizenship of parties.

Lastly. Something must be said on the position of parties buying while a suit concerning the land is pending.

²⁰ Castle v. Noyes, 14 N. Y. 335; Conger v. Chilcote, 42 Iowa, 24; Landes v. Hamilton, 75 Mo. 555. A posthumous heir born after suit brought against the apparent heirs is not bound by a judgment, as he does not come in under them. McConnell v. Smith, 39 Ill. 279.

²¹ See sections of this chapter on "Partition," "Sale for Partition," "Sale for Reinvestment."

This will conclude the discussion on the validity of the judgment. The next chapter will then take up:

Seventh. The validity of decretal sales, assuming the judgment to be valid. And, under the two last heads, the result of a reversal of the judgment under which the sale is had.

Eighth. The lien of money judgments.

Ninth. The requisites of a valid sale under execution; and herein of redemption.

Tenth. Sheriffs' and commissioners' deeds.

How important the knowledge of the former laws of practice may become was illustrated in 1885 by the decision of a land suit, in the supreme court of the United States, which turned on the law of Kentucky on orders of publication as it stood in 1802.²² But it is quite impracticable to treat this subject with anything like completeness in a book which is attempting to deal alike with all the states of the Union. Especially in regard to the sale of the lands of infants, etc., the laws of the states differ widely, and are often changed in each. It is not enough to tell the reader how closely the local statute must be followed; but many of the requirements of these statutes have to be set out in detail, before it can be said which are material and which are not. The writer has in his Kentucky Jurisprudence tried to perform this work for that one commonwealth, and to give, not only the state of the present law, but in separate sections also the older law, as questions of title may often arise under judicial sales which took place under statutes now repealed. Such a historical account of the statutes in each state would swell this chapter into a bulky volume.²³

Aside of the acquisition of a title by or under the judgment of a court, the land lawyer is also interested in the validity or lack of validity of judgments or decrees determining the rights of adverse claimants to land. The more so as the old-fashioned action of ejectment, the judgment of which did not conclude any one, has been

²² Applegate v. Lexington, etc., Mining Co., 117 U. S. 255, 6 Sup. Ct. 742.

²³ Mr. Freeman's monograph on Void Judicial Sales, without going into any details about the statute law of the several states, covers 160 pages of text. The author of this treatise will be excused for taking from Kentucky, with the practice of which he is best acquainted, somewhat more than a fair share of examples and precedents.

abolished in all the states, except perhaps in Delaware; though a few states yet, in analogy to the old practice, grant a new trial as of course on payment of costs.²⁴ An apparent exception to the conclusiveness of a judgment upon a title is also found in the federal courts and in the courts of those states in which law and equity are kept strictly apart. While a judgment in an ejectment seems to dispose of the title to land, a wholly different result may thereafter be reached by a decree in equity.²⁵

We deal in this chapter with the question when a judgment or decree may be held void on collateral attack, and quote cases dealing with direct attack by appeal or review only in so far as they may bear on that question, or when such direct attack borders very closely on the collateral. In other cases, it lies out of the scope of this work. The effect of the probate of wills as res judicata has been treated elsewhere, excepting as to the choice locally of the right court, and the effect of an error in such choice. This, and the rendition of judgments in a county other than that of the domicile or place of service, will be treated in connection with "Jurisdiction of Subject-Matter."

§ 144. Actual Notice.

Whenever a judgment is obtained in a "superior court" or "court of record," and the record of the cause shows, among the steps preceding the judgment, the return of the sheriff, or other like officer, who served the writ, to the effect that it was executed or served (e. g. that a copy was delivered to the defendant), the truth of the return can-

²⁴ Peterman v. Huling, 31 Pa. St. 432, and Secrist v. Zimmerman, 55 Pa. St. 446, explain the law of conclusiveness of ejectment for Pennsylvania, and incidentally for other states. See Deery v. McClintonck, 31 Wis. 195, 204, as to statute allowing new trial as of course in ejectment, and giving this as a reason why a title should not be tried in a suit for partition. See Balkam v. Woodstock Iron Co., 154 U. S. 177, 14 Sup. Ct. 1010, about two trials of title in Alabama (where the plaintiff has the choice between the old fictions and statutory ejectment); also, on the conclusiveness of first judgment, Barrows v. Kindred, 4 Wall. 399; as to two concurrent judgments in Pennsylvania, Britton v. Thornton, 112 U. S. 526, 5 Sup. Ct. 291.

²⁵ Parker v. Shannon, 137 Ill. 376, 27 N. E. 525; Ryder v. Loomis, 161 Mass. 161, 36 N. E. 836; and many other cases.

not be gainsaid (within the same state) after the time during which the court retains power over its judgment; not even in a direct suit to vacate the judgment, unless the plaintiff had been guilty of procuring the false return. In no case can this be done "collaterally," that is, by endeavoring to treat the judgment as void, upon proof that in fact the process had not been served. On this proposition it seems that the courts are fully agreed; at least, where the service is made by a sheriff, or like officer, in his official capacity, when it is actual service (delivering a copy of the summons or reading it to the defendant), and when the judgment based thereon comes under "collateral attack" before a court of the same state, or, as it is usually expressed, when the attack is made upon a home judgment.²⁶

An exception has lately been ingrafted on this doctrine by the supreme court of Massachusetts, based on some remarks of the supreme court of the United States as to the bearing of the fourteenth amendment. Whatever process may be prescribed by the state against its citizens, it cannot authorize personal judgment against persons not subject to its laws, and absent from its borders, without a hearing, or notice of a hearing, given within the jurisdiction. Nonresidents, therefore, may show that when a supposed service was made on them at their "usual" or "last" abode they really had no abode within the state.²⁷

²⁶ Thomas v. Ireland, 88 Ky. 581, 11 S. W. 653 (judgment against the wife, where the false return was induced by the husband); Cook v. Darling, 18 Pick. 393; Granger v. Clark, 22 Me. 128; Nichols v. Nichols, 96 Ind. 433 (aversion that the sheriff had served on other man of same name); Rowell v. Klein, 44 Ind. 290; Goodall v. Stuart, 2 Hen. & M. (Va.) 105 (as to a sheriff's return of nulla bona it is said: "In a contest between other persons, any fact between those persons which is verified by the sheriff's return cannot be controverted"); Coit v. Haven, 30 Conn. 190 (where the return was of leaving a copy at the defendant's usual abode, when he had none in the state). Contra, Mastin v. Gray, 19 Kan. 458 (making the law for that state), where such return was successfully attacked against a purchaser under execution. None of the cases there quoted are quite in point. That in some states the sheriff's return may after judgment be impeached in direct proceedings as to matters not within his personal knowledge, see McNeill v. Edie, 24 Kan. 108. But this is rather a question of practice.

²⁷ Elliot v. McCormick, 144 Mass. 10, 10 N. E. 705 (receding from McCormick v. Fiske, 138 Mass. 370, where the constitutional point had not been raised), followed in Needham v. Thayer, 147 Mass. 536, 18 N. E. 429.

On the other hand, when the record fails to show in any way that a defendant in a civil action or suit in law or equity has been notified, and he has not appeared in person or by attorney (for instance, where the proceedings are by publication or warning order), a personal judgment calling for execution against all of the defendant's property, even such a judgment for costs, is plainly void,²⁸ also when otherwise the lack of service is apparent. However, it has been said in Indiana and Iowa that where the record is silent the presumption is in favor of service,²⁹ and mere irregularity in the process or in its return cannot be relied on in a collateral attack upon the judgment.³⁰

²⁸ Roberts v. Stowers, 7 Bush (Ky.) 295; Boswell's Lessee v. Otis, 9 How. (U. S.) 336 (dictum); Pennoyer v. Neff, 95 U. S. 714 (the leading case); Freeman v. Alderson, 119 U. S. 185, 7 Sup. Ct. 165 (judgment for costs); Fontaine v. Fitzhugh, 36 W. Va. 1112, 14 S. E. 447; O'Brien v. Stephens, 11 Grat. 610; Coleman's Appeal, 75 Pa. St. 441; O'Reilly v. Guardian Mut. Ins. Co., 60 N. Y. 169. But see, as to costs of partition, on service outside of state, Jenkins v. Fahey, 73 N. Y. 355. And the execution sale is void, though there is a valid attachment, under which the same land might have been sold. Cassidy v. Woodward, 77 Iowa, 354, 42 N. W. 319.

²⁹ Long v. Montgomery, 6 Bush (Ky.) 395 (judgment void where the endorsement "executed" is not signed); Simms v. Simms, 88 Ky. 642, 11 S. W. 665 (where a special bailiff does not sign his return, though there is a jurat); Hawkins v. Hawkins, 26 Ind. 66 (where the record showed an unreturned summons, and this countervailed the recital of service in the judgment). And see below, under Service on Infants, who to serve process, etc.

³⁰ As where the summons lacked the requisite seal, Krug v. Davis, 85 Ind. 312; "served defendants" is a sufficient return, Hillegass v. Hilegass, 5 Pa. St. 97; Evans v. Calman, 92 Mich. 427, 52 N. W. 787 (an evident mistake in date of service is immaterial); King v. Spearman, 3 B. Mon. 289; same principle, Taylor v. McClure, 28 Ind. 39 (justice's record need not set forth return in full); Schee v. La Grange, 78 Iowa, 101, 42 N. W. 616 ("caused to be served" good after judgment); Dwiggins v. Cook, 71 Ind. 579 (on incomplete record, want of service cannot be assumed); O'Driscoll v. Soper, 19 Kan. 574 (journal entry prima facie proof of service). But see very stringent rule in Illinois, Hochlander v. Hochlander, 73 Ill. 618 (not case of collateral attack, but want of jurisdiction made cause of reversal). On the point that under the state constitution process must run in the name of the commonwealth, it has been held that the legislature may authorize the beginning of a suit by the plaintiff's own summons. Gilmer v. Bird, 15 Fla. 416. But it seems that where the summons or notice names the relief which is sought, e. g. the sum of money for which judgment is asked (in accordance with a law requiring

There are many intermediate cases. The statements in the record may be very vague,—nothing perhaps but the formal entry “and the defendant having been duly summoned and solemnly called.” As a general rule, it may be said that whether the indications of the record be sufficient or not they can neither be helped out nor weakened by facts outside of it; though the reference to a defendant in the pleadings as nonresiding or absent from the state is considered as proof against actual service.³¹ When the record professes to contain the return of process, and such return shows that the wrong person has been served, or that the defendant has not been found, or has been improperly served, it cannot be assumed, even when the common entry, such as given above, precedes a default, that there was also another, and better, service made upon such defendant.³² But it is now fully established that the return of process shown by the record from a sister state may be controverted; for the state in which the judgment is sought to be enforced will not send its own citizens to another jurisdiction for relief.³³

In many states a defendant can be served with a summons by leaving it for him at his last place of residence; and such a service is deemed actual, so as to support a personal judgment.³⁴ In all

such particular), a judgment by default adjudging other relief or a greater sum of money ought to be void, at least for the excess, while an omission to name the amount would be an irregularity only.

³¹ *Bustard v. Gates*, 4 Dana (Ky.) 429 (parol evidence of absence not admitted against record). In *Galpin v. Page*, 18 Wall. 350, it appeared from the complaint. Even further in the supposition that there might have been service, when there clearly was none, goes *Ferguson's Adm'r v. Teel*, 82 Va. 690; while *Lavell v. McCurdy*, 77 Va. 763, is even more extreme on the opposite side, and wholly untenable.

³² So said in *Galpin v. Page*, supra; *Hahn v. Kelly*, 34 Cal. 391 (both cases of constructive service); *Beverly v. Perkins*, 1 Duv. (Ky.) 251 (where there was service on infants under 14 by delivery of copy to them); and many cases below, *passim*.

³³ *Coit v. Haven*, supra (arguendo, if it be a foreign judgment, etc.); *Knowles v. Gaslight & Coke Co.*, 19 Wall. 58 (direct). And see other cases in sections on “Appearance.”

³⁴ *Harris v. Hardeman*, 14 How. 339, under Mississippi statute, authorizing the summons to be left in a public place of the residence if the defendant cannot be found, nor his wife or other member of his family over 16

most every state (under the codes of procedure, which follow the pattern set in New York), rules or notices based upon some order of, or step in, a court of justice, may be served by "leaving a copy at the residence" of the defendant to such rule or notice, with some person

found at the house. A return showed neither of these conditions fulfilled, nor that the summons was left at "a public place." The judgment by default was held void, and a forthcoming bond under the execution was quashed. The supreme court of the United States acted as most state courts would have acted, but three judges dissented. To same effect is *Pollard v. Wegener*, 13 Wis. 569 (case of collateral attack), approved in *Matteson v. Smith*, 37 Wis. 333. At common law a summons is executed by either delivering a copy or reading it to the defendants, *Hedges v. Mace*, 72 Ill. 472; and, the statute pointing out no mode for summons at law in Illinois, or for any summons in Maryland (article 75, §§ 129, 130), it can only thus be served. In New York, the Code of Procedure (section 426) allows as actual service only the delivery of a copy. So in Kentucky, Code Prac. § 52; Montana, div. 1, §§ 71, 76; Nevada, §§ 3051, 3056; Idaho, §§ 4144, 4146; California, Code Civ. Proc. §§ 410, 416; Michigan, § 7300; Alabama, § 2655; North Carolina, § 217. In Tennessee (section 3534), reading or offering to read the process is the only known kind of service. In the following states the copy may be left "at the usual place of abode" without any condition precedent of the defendant not being found: New Hampshire, c. 219, § 2, "or leaving at his abode an attested copy * * * or reading"; Connecticut, Gen. St. § 908; Maine, c. 81, § 18; Massachusetts, chapter 161, § 31, leave it "at the last and usual abode"; New Jersey, "Practice," § 49, "left at his dwelling house or usual place of abode"; Vermont, R. L. § 871, "to the defendant or to some sufficiently discreet person residing with him, or if there is no such, etc., it may be left at usual place of abode." Rhode Island has it (chapter 207, § 3) much like Ohio (St. § 5042), that is, "at defendant's usual residence"; also in Ohio, in suit against partnership, at the usual place of business. Indiana, Rev. St. § 315, "leaving a copy at his usual or last place of residence." In Illinois, in chancery cases (chapter 22, § 11) "or leaving such copy at his usual place of abode, with some person of the family of the age of 10 years or over, and informing him of the contents." So, in Kansas (paragraph 4143), "at the usual place of residence"; in Minnesota (chapter 66, § 59), "or at the usual place of abode with some person of suitable age," etc.; Nebraska (section 4607), "or by leaving one at his usual place of residence"; Colorado (Code Civ. Proc. § 38), "or by leaving a copy of the writ at [his] usual place of abode with some member of his family over the age of 15"; Florida (section 1015), reading or delivery, "or by leaving such copy at his usual place of abode with some person of the family above 15, etc., and informing such person," etc.; Arkansas (section 4976, subd. 3), same as Florida, but without "informing," etc. In Missouri (section 2017), by reading or delivering copy "or by leaving a copy of the petition and writ at his

of a certain age, generally 16 years. In some states an ordinary summons may be thus served when the defendant cannot be found. Such service justifies a personal judgment, but the conditions of the

usual place of abode with some person of his family over the age of 15 years." In Georgia (section 3339), leaving a copy at defendant's residence shall be sufficient service. In other states the return must state, if the service is other than by delivery to defendant, that he could not be "conveniently found" (Pennsylvania, Purd. Dig. "Actions Pers." § 2), when "leaving a copy at his dwelling house in the presence of an adult member of his family," etc., will suffice. See *Weaver v. Springer*, 2 Miles, 42, and *Winrow v. Raymond*, 4 Pa. St. 501,—neither a case of collateral attack,—as to insufficient returns. Under section 9 a nonresident business man can be served by leaving copy with his clerk at his place of business. In Wisconsin (section 2636), "or if not found, by leaving a copy thereof at his usual place of abode, in presence of a member of his family," etc., but the sheriff need not look for him beyond his abode (*Lewis v. Hartel*, 24 Wis. 504); but a defect in the return as shown *supra* is fatal. A mother-in-law is, under such statute, a member of the family. *Merritt v. Baldwin*, 6 Wis. 439. In West Virginia (chapter 50, § 32), if he is not found, the summons may be served "at his usual place of abode, and if," etc., "may be posted." In the Dakotas (Terr. Code, § 102, subd. 6), if the defendant cannot conveniently be found, by leaving a copy thereof at his dwelling house, etc., or if he reside in the family of another," etc. The Mississippi statute (section 3427) is indicated at the head of this note, with its two conditions and substitutes. In South Carolina (Code Civ. Proc. § 155) if the defendant resides in the state, but is temporarily absent, the copy may be delivered to any person over 21 residing at his residence, or employed in his business. In Washington (section 173, subd. 12), "or if he be not found, to some suitable person, a member of [his] family at [his] dwelling house or usual place of abode." In Oregon (section 55, subd. 5), same provision, with words "above the age of fourteen" added. In Virginia (sections 3207, 3224), "or if he be not found at his usual place of abode, by delivering such copy and giving information, etc., to his wife or any person found there, * * * a member of his family above 16." Iowa (section 2603, subd. 2), "if not found within the county of his residence, by leaving a copy of the notice [all summons in Iowa is called "notice"] at his usual place of residence with some member of the family over 14," etc. In Connecticut, service at the place of abode has been sustained, though the defendant showed that he did not reside in the state. *Coit v. Haven* (*supra*, note 26); *Hurlbut v. Thomas*, 55 Conn. 181, 10 Atl. 556. See, also, *Southern Steam Packet Co. v. Roger*, 1 Cheves (S. C.) 48, where the defendant returned to the state. In New York, any service not on the defendant in person is known as "substituted," and can only lead to a judgment in rem; but, where service as above is authorized, it is deemed

law authorizing such service must be strictly fulfilled, and the manner prescribed closely followed.³⁵

Under the old practice, rights growing out of the steps in an action, such as the liability of bail for a person arrested for debt, are enforced by scire facias; and by that practice two returns of nihil on such a writ are deemed equal to a return of scire feci, and will support a valid judgment. This course is justified by considering that the party to be notified is already aware of the pending proceedings, and cannot be surprised by the judgment against him. But in Pennsylvania a scire facias which may be thus served is the ordinary process for enforcing mortgages, and in many cases, with the full knowledge of the courts, two nihil are returned, without any attempt to notify anybody.³⁶ Upon a like principle, where a party has been brought personally into the court of first instance by service or appearance, and judgment has been rendered in his favor, he cannot withdraw himself from the power of a court of error or appeal, to render judgment against him in personam, though he may, by leaving the state or otherwise, evade the service of a citation.³⁷

personal (expressly so stated in many of the Codes,—e. g. in Dakota); and a personal judgment based on it is respected in other states. *Biesenthal v. Williams*, 1 Duv. (Ky.) 329.

³⁵ In the New York Code of Procedure the notice for beginning special proceedings is to be served like a summons (section 433), except in proceedings for a contempt, and those specially provided for; and none seem to be provided for that could lead to a personal judgment for money, enforceable by execution. It is otherwise in many of the Codes modeled after that of New York. See, for instance, the Kentucky Code of Practice (sections 444-449) on summary proceedings which are allowed to surety against principal or cosurety for money paid, and to client against attorney for money collected, though in either case not through process of law, and in some other cases. The notice of motion for judgment may be served (section 624), if the defendant cannot be found at his usual place of abode, by leaving a copy there with a person over 16, residing in the same family with him; or, if no such person be there, by affixing such copy to the front door. A fortiori, rules of court for payment of money appearing due by the record may be thus served.

³⁶ *Delano v. Jopling*, 1 Litt. (Ky.) 118, where judgment thus obtained in Virginia was enforced in Kentucky. As to scire facias sur mortgage in Pennsylvania, see *Murray v. Weigle*, 118 Pa. St. 159, 11 Atl. 781; *Hartman v. Ogborn*, 54 Pa. St. 120; *Tryon v. Munson*, 77 Pa. St. 250; *Warder v.*

³⁷ *Nations v. Johnson*, 24 How. 195, 203.

Under the old chancery practice the actual service of a subpoena on infants or on persons of unsound mind was, in many states, deemed unnecessary, though the English practice dispensed with it only in very special cases; and many titles depend on decrees rendered against defendants under such disability, after defense by guardian or committee, though no copy of the subpoena had ever been delivered to the party in interest, such act being deemed useless.³⁸ At present the manner of serving infants with process is almost everywhere regulated by statute; in most states by a code of practice or

Tainter, 4 Watts, 270. This was the prevailing mode of enforcing mortgages in Ohio from 1802 to 1829. See dissent of Thurman, J., in Moore's Lessee v. Starks, 1 Ohio St. 369.

³⁸ Bustard v. Gates, 4 Dana (Ky.) 429; Bank of U. S. v. Cockran, 9 Dana (Ky.) 395; Benningfield v. Reed, 8 B. Mon. 105. Service on the guardian statutory or ad litem was enough, and the appearance of or service on other defendants gave the court power to appoint a guardian ad litem. However, in Steele v. Taylor, 4 Dana (Ky.) 448, the answer of such guardian, appointed without previous service, is deemed irregular, and the infants for whom he answers are held not to be before the court. So, also, Shropshire v. Reno, 5 Dana (Ky.) 583; but it was a case of appeal, not of collateral attack. The suits against infants used to be mostly in equity. The English practice was to dispense with the service of subpoena on infants only in exceptional cases. Smith v. Marshall, 2 Atk. 70; Thompson v. Jones, 8 Ves. 141. The New York chancery practice was to serve infants "in the usual manner." Bank of Ontario v. Strong, 2 Paige, 301. In Ohio (1838) the loose practice of not serving infants is regretted, and a decree obtained after appointment of guardian ad litem is reversed on bill of review, but is not declared void. Massie v. Donaldson, 8 Ohio, 377. But in Moore v. Starks, 1 Ohio St. 369 (Thurman, J., dissenting), a decree of sale rendered against an infant heir, a subpoena having been served only on his codefendants (mother and step-father), and returned not served on him, was held void, and the old practice of not serving infants reproved as contrary to law. In New York, until 1877, the Revised Statutes were in force as to proceedings in partition, and infants in these were not personally summoned. Gotendorf v. Goldschmidt, 83 N. Y. 110. In Iowa the appointment and answer of guardian ad litem do not cure want of service, Allen v. Saylor, 14 Iowa, 437; nor in Indiana, Roy v. Rowe, 90 Ind. 54. See, also, Jones v. Mason, N. C. Term R. 125. Where the child is out of the jurisdiction, service on the father was held good. Kirwan v. Kirwan, 1 Hogan, 264. And under the then prevailing rules in chancery in Alabama, such service was deemed better than personal service on the child. When a parent or custodian is to be served, one copy for several children is enough. Huggins v. Dabbs (1893) 57 Ark. 628, 22 S. W. 563.

procedure. Many of the laws on the subject draw a distinction between children under 14 years of age and those over 14. The latter are to be served like adults; while, as to the former, some states require that a copy be delivered to the infant, no matter how young, and another copy to his "father, or, if he have no father, to his guardian, and if he have no guardian (or none in the state) then to the person having charge of him;" while other states dispense with the delivery of a copy to infants under 14, and require only that the father, guardian, or custodian be served.³⁹ Some of the codes, like that of Indiana, are silent as to the manner of serving infants. It follows that they must be served like adults.⁴⁰

³⁹ New York, Code Civ. Proc. § 426, and copied from it: Minnesota, c. 66, § 59; California, Code Civ. Proc. § 411; South Carolina, Code Civ. Proc. § 155 (if the minor is under 14, a copy is delivered to him, and an additional copy in the following order: to his father, mother, or guardian, or to a person having care of him, or with whom he resides, or by whom he is employed); Kentucky, Code Prac. § 52, children over 14 served like adults; under 14, the service is on the father, guardian, mother, or person having charge, in this order, on each only if those preceding cannot be found. Under the former Codes (1851-1876) in the latter case, service on both was required. Pennsylvania, also (Brightly, Purd. Dig.), under heads of "Real Actions," 2, and "Orphans' Courts," 28, directs summons for infants under 14 to be served on guardian, or on next of kin when there is none, and authorizes service upon the guardian as to all infants. When the guardian, as such, is plaintiff, the delivery of copy to him, being superfluous, may be dispensed with. *Morrisson v. Garrott* (Ky.) 22 S. W. 320. When he sued in his own interest, service on him was enough, though deemed unfair (*Schuler v. Mays*, 5 Ky. Law Rep. 331), till the amendment (1882) to Code Prac. Ky. § 52, directed the clerk, whenever all the persons to receive the copy are plaintiffs, to appoint a guardian ad litem to receive process. Copy need not be delivered when the father or guardian is plaintiff. *Brown v. Lawson*, 51 Cal. 615. *Helms v. Chadbourne*, 48 Wis. 690, 4 N. W. 1065, requires that the father or guardian, though himself a defendant, receive an extra copy for the child.

⁴⁰ Thus, in Indiana, no mode of service on infants is pointed out. Process and notices of all judicial proceedings in Indiana should be served on infants as on adults, *Hough v. Canby*, 8 Blackf. 301; *Abdil v. Abdil*, 26 Ind. 287; otherwise the judgment is void, *Doe v. Anderson*, 5 Ind. 33; *Hawkins v. Hawkins*, 28 Ind. 73; *Babbitt v. Doe*, 4 Ind. 355. Some of these cases, as to sales by administrators, would now be good by the statutes making the order of sale conclusive on behalf of a purchaser in good faith. See hereafter sections 150 and 151. See *Gerrard v. Johnson*, 12 Ind. 636.

Where a person of unsound mind, and found to be such by inquest, is a defendant, the old practice did not require him to be actually served; but service on his committee was deemed sufficient; or the court in which the suit was brought would appoint a committee for him.⁴¹ The modern codes generally regulate the manner of serving defendants who are of unsound mind, and in some cases direct that there shall be no personal service, as it might aggravate the malady.⁴² When infants or persons of unsound mind are served, and the return of a sheriff or regular officer leaves it in doubt whether the method pointed out by the law has been pursued, e. g. whether for children under 14 years a copy has been left with the father, guardian, or custodian, the principle "omnia præsumuntur rite acta" applies; for the sheriff ought to know his duty. But such presumption might not be indulged if the return was made by a private person, or perhaps even when made by a special bailiff.⁴³

In suits against husband and wife, the old chancery practice deemed service on the husband sufficient, unless the bill affected the wife's separate estate, or was directed against her as executrix or administratrix.⁴⁴ The modern codes of procedure know no such dis-

as to presumption of service where the contrary does not appear. *Thompson v. Doe*, 8 Blackf. (Ind.) 336 (he might have been present in court).

⁴¹ As to service in ejectment on lunatic, see *Doe v. Roe*, 6 Dow, 270; *Doe v. Roe*, 2 Chit. 183. Subpoena in chancery, *Stigers v. Brent*, 50 Md. 214, and cases there quoted. Mitford, in his *Equity Pleading*, thought service necessary. Chancellor Kent, in *Brasher v. Van Cortlandt*, 2 Johns. Ch. 242, thought otherwise, and is followed in *Trabue's Heirs v. Holt*, 2 Bibb (Ky.) 393. Actual service dispensed with as hurtful to lunatics' health. *Speak v. Metcalf*, 2 Tenn. Ch. 214.

⁴² E. g., New York, Code Civ. Proc. §§ 426, 427, 429; Kentucky, Code Prac. § 53, as amended in 1882.

⁴³ *Lloyd v. McCauley*, 14 B. Mon. (Ky.) 540. The bailiff, in his affidavits of service on a child under 14, stated that he had delivered a copy to the mother, without saying that neither father nor guardian could be found. The return was held worthless against a purchaser under the decree. But a similar return by the sheriff was held good in *Simpson v. Dunlap* (MS. Op. quoted in Stanton's Ky. Code, p. 303). Indiana allows (except outside of the state, and in some special proceedings) no service by a private person, and a judgment based thereon is void. *Milligan v. Poole*, 35 Ind. 64.

⁴⁴ *Daniel*, Ch. Prac. p. 435; *Ferguson v. Smith*, 2 Johns. Ch. 139 (Kent), followed in a dower suit, *Feitner v. Lewis*, 119 N. Y. 131, 23 N. E. 296.

tinction. Husband and wife have each to be served separately.⁴⁵

A return on the summons, stating that it has been served on the defendant, is not enough in itself, unless it be made by a person authorized to serve it. And it goes without saying that a return made by a private person, who does not act under an oath of office, must be verified by affidavit; and nearly all the states demand a like return from a bailiff appointed to execute a particular writ. The return made by an unauthorized person is no proof of the fact; and, even if it were, the defendant is, in some states at least, held justified in not appearing when he has been summoned by a person who has no authority to summon him.⁴⁶ Under the old chancery practice a subpoena could be served by any one, and, as long as a default led only to process of contempt, no great harm could arise. Among the rules of the supreme court governing the practice in equity in the federal courts, rules 13 and 15 govern the service of the subpoena. The former directs that a subpoena shall be served by a delivery of a copy thereof by the officer serving the same to the defendant personally, or by leaving a copy thereof at the dwellinghouse or usual place of abode of such defendant, with some adult person, who is a "member or resident in said family"—which seems to exclude the notion that the officer can make the delivery, as he may make a bodily seizure through a third, unofficial person. The fifteenth rule says that "service of all process shall be by the marshal of the district or his deputy, or by some other person specially appointed by the court for the purpose, and not otherwise. In the latter case the person serving process shall make affidavit thereof." There has been some dispute as to what is meant by a "deputy," but a refer-

Quare, whether one copy is enough for husband and wife, being delivered to latter for former at his residence. *Heatherly v. Hadley*, 2 Or. 269.

⁴⁵ New York, Civ. Code Proc. § 450, is very emphatic.

⁴⁶ Wisconsin, Ann. St. § 2635: Any one not a party can serve a summons. So in many other states. And the sheriff may depute any one not a party. *Toenniges v. Drake*, 7 Colo. 471, 4 Pac. 790; *Dyson v. Baker*, 54 Miss. 24. A sheriff, who is administrator, serving summons, judgment is void. *Knott v. Jarboe*, 1 Metc. (Ky.) 504; *Howard v. Lock* (Ky.) 22 S. W. 332 (where John King, as curator, was plaintiff, and the deputy of John F. King served the summons, and there was no other proof of identity, judgment upheld). See, also, *Kyle v. Kyle*, 55 Ind. 387. *Contra*, *Parmalee v. Loomis*, 24 Mich. 242.

ence to the acts of congress providing for deputy marshals clearly indicates that permanent deputies are meant.⁴⁷ The course of the marshal's office in some of the busiest districts has been the other way; that is, subpoenas are served by men appointed ad hoc, not by the court, but by the marshal.⁴⁸ The supreme court, mainly on the ground of laches and long acquiescence, refused to treat a decree resting on such defective service as void, without deciding outright on the validity of the service.⁴⁹ The service in common-law cases is governed by the state laws; the marshals having the same right to appoint special bailiffs to serve single writs as the sheriffs have in each state.⁵⁰

It is not, however, admitted everywhere that the service of the summons by an unauthorized person would render the judgment void any more than the service of an informal writ,—for instance, an unsealed summons in those states whose law requires a seal. In Massachusetts and other New England states we apprehend that the judgment of the court declaring the default, and thus recognizing the service as good, would be deemed conclusive.⁵¹ In Kentucky, on the other hand, where the service of process is very jealously watched, a special bailiff can serve a summons only if he has been appointed in writing indorsed by the sheriff on the summons before the service; and a lack of such written appointment cannot be cured by amendment, so as to give validity to a judgment by default; for such amendment would be an admission that the summoner was not authorized when he did the act.⁵²

The laws of many states allow a defendant named in a summons to acknowledge service in writing, over his signature, and where such a signature appears on the summons, or the written acknowledgment in the papers, though it be not attested, or not marked "filed" as the law requires, yet, when judgment by default has been rendered on

⁴⁷ U. S. v. Montgomery, 2 Dall. 335, Fed. Cas. No. 15,799; Hyman v. Chales, 12 Fed. 855 (common-law action); Kennedy v. Brent, 6 Cranch, 187.

⁴⁸ Hyslop v. Hoppock, 5 Ben. 447, Fed. Cas. No. 6,988.

⁴⁹ Martin v. Gray, 142 U. S. 236, 12 Sup. Ct. 186.

⁵⁰ Rev. St. U. S. § 788 (taken from the force laws of 1795 and 1861).

⁵¹ This seems to be the result of the Indiana authorities gathered in note 40. Rotch v. Humboldt College (Iowa) 56 N. W. 568.

⁵² Thompson v. Moore, 91 Ky. 80, 15 S. W. 6.

such proof of service, the court must have passed upon it, and it cannot be collaterally assailed.⁵³

A great number of states provide for serving a summons (generally with a certified copy of the complaint or petition attached) outside of the state, either within the United States, or even anywhere in the world. The judgment recovered on such service can only be *in rem*, i. e. against such property as is within the local power of the court.⁵⁴ The service must be proved by an affidavit in a minutely prescribed form. Such service is in every way more satisfactory than a warning order or publication. As the affidavit of service is made by a private person, no presumption of *omnia rite acta* can be indulged; but it seems that the return, which is nearly always prepared by the plaintiff's attorney, has been generally correct enough not to lead to trouble.⁵⁵

At common law, the payment of a judgment by one of two co-obligors discharges the judgment as to both. Hence, where a statute enables a surety who pays a judgment rendered against the principal and himself to take an assignment to himself, this is in effect the rendition of a new judgment, and requires notice; and if the entry of such transfer is made without notice to the principal, it and all further proceedings under the judgment are void.⁵⁶

⁵³ Stevenson v. Polk, 71 Iowa, 278, 32 N. W. 340. The husband could not, even under the old régime of married women, acknowledge service for the wife. Moore v. Wade, 8 Kan. 380. Judgment not held void because service acknowledged by infant under 14, Cates v. Pickett, 97 N. C. 21, 1 S. E. 763; nor disturbed after 15 years on testimony that acknowledgment of service by attorney in fact, which the court had acted on, was not authorized, Edwards v. Moore, 99 N. C. 1, 5 S. E. 13.

⁵⁴ Eby's Appeal, 70 Pa. St. 311, and expressly so limited by statute in many states. Smith v. Grady, 68 Wis. 215, 31 N. W. 477.

⁵⁵ New York, Code Civ. Proc. § 438 (old § 135); New Jersey, "Chancery," §§ 18, 19; Id. "Orphans' Courts," 155; Pennsylvania, Brightly, Purd. Dig. "Equity," 47; Id. "Decedents' Estates," 119 (as to revivor); Kentucky, Code Prac. 1854, § 86; Id. 1876, § 56, amended in 1890 so as to embrace infant defendants, etc. There is hardly a reported case bearing on the sufficiency of service outside of the state, the return being generally prepared by counsel with care. In Hahn v. Kelly, 34 Cal. 391, the question was raised, but not decided. Acceptance of service, dated outside of state boundaries, does not authorize a personal judgment. Scott v. Noble, 72 Pa. St. 115.

⁵⁶ Kentucky, Gen. St. c. 104, § 8; Veach v. Wickersham, 11 Bush, 261. (1080)

In some states (for instance, in New York and California) judgment by default may be entered by the clerk in a class of cases in which the recovery of a liquidated sum is sought. This power is strictly construed, and it has been held that it can only be exercised when all of several defendants have been served, so that it may be entered against all. If all of them have not been served, the judgment entered by the clerk is void in toto.⁵⁷

Where the return of process is defective, so that it might not support a valid judgment, it may be amended in accordance with the truth by the sheriff or other officer, long after judgment, and after his term of office is at an end, so as to be made to sustain it.⁵⁸

Much difficulty and dispute has arisen out of the provisions of the law for serving process on corporations, especially on foreign corporations; but as the dispute hardly ever turns about the title to land, as affected by judgments resting on such process, it lies almost outside of the scope of this work.⁵⁹

Does the pendency of a suit in which a defendant is summoned, sub-

⁵⁷ New York, Code Civ. Proc. § 1212; California, Civ. Proc. § 538; Junkans v. Bergen, 64 Cal. 203, 30 Pac. 627. The statement in Freeman on Judgments (section 316) must be restricted to states in which defaults are entered by the clerk. Where one is entered in open court, it may be valid as to some, void as to others. Jasper Co. v. Mickey (Mo. Sup.) 4 S. W. 424; Douglas v. Massie, 16 Ohio, 271. Freeman on Judgments (section 136) states the rule of "void as to one, void as to all" more broadly, mainly on the strength of Buffum v. Ramsdell, 55 Me. 253, and is supported by Wright v. Andrews, 130 Mass. 150, and by Hanley v. Donoghue, 59 Md. 239. But this and Abbott v. Renaud, 64 N. H. 89, 5 Atl. 830, were reversed by the supreme court of the United States in Hanley v. Donoghue, 116 U. S. 1, 6 Sup. Ct. 242, and Renaud v. Abbott, 116 U. S. 277, 6 Sup. Ct. 1194, as not giving to judgments the faith and credit due to them. His position is also criticised in Joyes v. Hamilton, 10 Bush (Ky.) 544, and is contrary to the rulings in several other states, and against sound principle.

⁵⁸ Foreman v. Carter, 9 Kan. 674; Dwiggins v. Cook, 71 Ind. 579; Adams v. Robinson, 1 Pick. 461; and like decisions in almost every state, running back to statute 8 Hen. VI. c. 12.

⁵⁹ Great Western Min. Co. v. Woodman of Alston Min. Co., 12 Colo. 46, 20 Pac. 771 (sale of corporation lands held void because the person served as general agent was shown collaterally not to be such), is the only case in point we could find. In Goldey v. Morning News, 156 U. S. 518, 15 Sup. Ct. 559, there is a very full array of authorities, especially on the point whether the president of the corporation can be served with process in a sister state.

ject him to the cognizance of the court to enforce the claims of his codefendants, set up in answers, or must each answer be made a cross complaint, and process on this be served? A personal judgment on the answer alone seems certainly to be unauthorized;⁶⁰ but the common case is that the debtor's land is bound to two or more incumbrancers. One of these sues, and makes the others, along with the debtor, defendants. The court is to ascertain amounts due and priorities, and decree a sale for enough money to pay all. If the complainant states the nature and amount of all the other incumbrances as fully as his own, this seems proper enough; but often he cannot or will not do so. He merely says, after setting forth his lien claim against B, that C and D also claim some lien on the land. Can C and D, by setting forth their lien claims in their answers, put B in default, and will the decree, in so far as it ascertains and enforces their claims, be valid?

The mortgagee in the old chancery practice, who in a suit to foreclose, or to redeem and foreclose, brought in other mortgagees, was not required to wait for cross bills on their part; but under the old doctrine of mortgages and of strict foreclosure the principal defendant knew from the beginning that the loss of his whole interest was at stake; and the enforcement of several liens by sale is hardly parallel to it. Very little can be found on the subject, and where a judgment for one defendant against another is held void on appeal, this may mean "voidable"; yet it seems that on principle a judgment to sell a man's land upon a demand of which he has never been notified, under a system of practice which recognizes and regulates cross bills, can hardly be valid.⁶¹ In most states the proceedings

⁶⁰ *Cavin v. Williams*, 8 Bush (Ky.) 343 (where, however, the decision of the court goes beyond disapproving the personal judgment); *State v. Ennis*, 74 Ind. 17; *Joyce v. Whitney*, 57 Ind. 550 (both, surety against principal). *Contra*, *Bevier v. Kahn*, 111 Ind. 200, 12 N. E. 169, where the complaint stated the facts on which the judgment between defendants was based. Whether a cross complaint against the plaintiff is germane is for the trial court to decide. Its judgment cannot be assailed collaterally. *Guthrie v. Lowry*, 84 Pa. St. 533. See, however, *Bates v. Delavan*, 5 Paige (N. Y.) 299, where the cross complaint under the federal practice had been made in a separate suit. In *Smith v. Woolfolk*, 115 U. S. 143, 5 Sup. Ct. 1117, a decree for one complainant against another was held void on collateral attack.

⁶¹ *Roller v. Reid* (Tex. Sup.) 26 S. W. 1060 (judgment by default on allegation (1082)

against collectors of the revenue are very summary. In Kentucky a former law set a time and court when and where each year a motion for judgment may be made against any sheriff and his sureties for judgment for revenue collected and not accounted for. The validity of the law has never been doubted.⁶²

§ 145. Appearance.

A defendant often appears and defends, or appears and suffers default, in an action in which he has not been summoned. And a plaintiff, though under disability of infancy or of unsound mind, lays himself liable to a judgment or decree in bar of his claim, without any right to open it after the removal of his disability; and, if he be *sui juris*, also to a judgment upon a counterclaim or set-off or for costs, without any summons being served upon him, simply by the appearance which is implied in his bringing the suit.⁶³ Questions

tions of answer void); *Cavin v. Williams*, *supra*, overruling *Jenkins v. Smith*, 4 Metc. (Ky.) 380, and in line with *Horine v. Moore*, 14 B. Mon. 251. *Cullum v. Erwin*, 4 Ala. 452 (contest among incumbrancers); *Shelby v. Smith's Heirs & Ex'r's*, 2 A. K. Marsh. 504,—are all quoted; but none are on collateral attack, nor on the exact question. In *Walker v. Byers*, 14 Ark. 246, it is said that the decree for one defendant against the other may be based on statements in the bill, and this is now the statute law in Kentucky (Code Civ. Prac. § 692).

⁶² Kentucky, St. 1894, § 4172, is the present act. *Burnam v. Com.*, 1 Duv. 211, sustained a law authorizing judgment against the members of the "provisional government" for revenue seized by them, on constructive service,—a position which can hardly be maintained, in favor of the commonwealth any more than of an individual. The present statute requires the mailing of notices. The Code of Practice of 1854 (sections 485–498) required no notice other than the setting of time of the motion by the general law.

⁶³ "An infant plaintiff is always concluded." *Gallatian v. Cunningham*, 8 Cow. 361, 366,—where the remark is made in arguing the validity of a judgment selling lands for division at the suit of an infant. Hence, where the suit is brought by a next friend, and not by the statutory guardian, the chancellor will not allow it to go on, at least not in the name of the infant as complainant, if he thinks that the infant's rights are thereby endangered. Yet it often happens that an unfaithful or reckless guardian or procurator by a foolish suit risks the patrimony of his ward, or by an application for sale wastes or embezzles it. See *Brittain v. Mull*, 99 N. C. 453, 6 S. E. 382, where the plaintiff was of unsound mind; 1 *Daniell, Ch. Prac.* 71, quoting

on the validity of a judgment arise because the record does not clearly show the appearance of some one of the parties; at other times, because the authority for entering such appearance is denied, as the appearance is nearly always made by attorney, and very often it is not authenticated by the signature—at least not by an officially attested signature—of the party.

The doctrine that whoever comes voluntarily into court lays himself liable to its judgment without further notice, has been carried very far. One who becomes the administrator of an estate, in New York, is supposed to be and remain an accountant in the surrogate's court, and judgment for the final balance may be rendered against him though no lawful notice has been served upon him to close his accounts.⁶⁴ Where a judgment is rendered against a defendant, which is reversed upon his appeal on the very ground that he had no notice, his appeal is in itself an appearance, and upon the return of the cause to the lower court a binding judgment may be rendered against him without further appearance or service of notice.⁶⁵ The usual entries on the record, "Now come the defendants," are generally restricted to those who have been summoned or have answered by name, when the summons has been returned "Not found" as to others.⁶⁶ But should the court in which the suit is pending construe these words, or the general appearance of an attorney "for

Lord Brook v. Lord Hertford, 2 P. Wms. 518. In Doyle v. Brown, 72 N. C. 393, a former plaintiff was allowed to set aside a judicial sale under which a party had bid in lands held by them in common, on the ground that this was a direct, not a collateral, attack. A hard case, however, is Morris v. Gentry, 89 N. C. 248, where a petition to sell infants' land, professing to be filed by their mother as next friend, led to the sale and utter loss of the land, but they were not allowed to show that the name of the mother, absent in another state, was used without her consent.

⁶⁴ Moore v. Fields, 42 Pa. St. 467. So held in Pennsylvania in an action there on the judgment rendered by the New York surrogate. In many states the probate court has no power to render such a judgment, courts of equity alone being competent to decree in favor of legatees and distributees.

⁶⁵ Salter v. Dunn, 1 Bush, 311; Cavin v. Williams, 8 Bush, 344.

⁶⁶ Crump v. Bennett, 2 Litt. (Ky.) 213; Violett v. Waters, 1 J. J. Marsh. 303, cases in error, not of collateral attack. In California and the states copying its Code of Procedure, the appearance of a defendant can only be entered by an attorney answering or demurring for him; an attorney's giving notice of appeal, etc., in a defendant's name is not an appearance on which a valid judgment can rest. Steinbach v. Leese, 27 Cal. 295.

defendants," as applying to all, it would hardly be competent for another court to treat as void the judgment rendered on such an assumption.⁶⁷

In those states in which the marital powers of the husband have not been wholly destroyed, and where a married woman is not given all the powers of a feme sole over her property, it would seem that the husband has the power to bring a joint action or suit in equity for himself and wife in the right of the latter; and to enter her appearance, or employ an attorney to appear and answer for her, in an action or suit brought jointly against him and her, except where the cause affects her separate estate, or her character as executrix or administratrix.⁶⁸ It is otherwise in states which give to a married woman full and free control of her property. In New York, the Code, in so many words, negatives the husband's right to appear or answer for his wife.⁶⁹ An infant must in all cases, at law, in equity, and under the modern Codes, plead or answer by guardian; generally by his statutory or testamentary guardian, when he has one. Hence the only object of a summons seems to be the answer of the regular guardian, when there is one; and, if he answers without such previous summons no harm is done. Such has been the decision in Kentucky and in Missouri.⁷⁰ However, in Indiana it has been held (at least in a statutory proceeding against heirs to sell the intestate's lands for debt) that the guardian cannot waive process, and answer for his ward, and, a fortiori, a guardian ad litem; thus the mother of the unsummoned infant cannot appear for him in New York.⁷¹

Whether a judgment can be collaterally assailed upon the allega-

⁶⁷ Hall v. Law, 2 Watts & S. 135 (judgment on very slight entry of appearance on the docket, against defendant "not found," sustained on error, the court regretting the loose practice).

⁶⁸ Morris v. Garrison, 27 Pa. St. 226. See Daniell, Ch. Prac. And the married woman is as much bound by her attorney's actions as any one else. Williams v. Simmons, 79 Ga. 649, 7 S. E. 133.

⁶⁹ New York, Code Civ. Proc. § 450.

⁷⁰ Smoot v. Boyd, 87 Ky. 642, 9 S. W. 829. So, as to lunatic and committee, Finzer v. Nevin (Ky.) 18 S. W. 367. See other cases under "Partition." Price v. Winter, 15 Fla. 66; Payne v. Masek, 114 Mo. 631, 21 S. W. 751.

⁷¹ Doe v. Bowen, 8 Ind. 197; Ingersoll v. Mangam, 84 N. Y. 622. But an idiot was allowed to appear by his foreign guardian, unserved. Rogers v. McLean, 34 N. Y. 536.

tion that the attorney entering an appearance was not authorized to do so, or that the instrument purporting to be his appearance was not signed or authorized by him, is a disputed question. In New York and in Ohio the doctrine of the court of appeals is that a judgment may be treated as void if such lack of authority or of authenticity can be shown. The proof, however, is on the party who alleges it, the record entry being strong evidence in its own favor.⁷² It has been said that the court, in allowing an attorney to enter an appearance, necessarily passes on his authority to do so, and that for this reason the truth of the proposition that the attorney was authorized cannot be gainsaid. But it seems to us that such an argument is highly artificial, and not founded in fact. The attorney is often mistaken about his powers, being employed by a third person for a supposed client at a distance.⁷³ A distinction, first suggested in an English case of Queen Anne's time, to let the judgment stand on an unauthorized appearance when the attorney is responsible, but to set it aside when he cannot answer the party whom he falsely represented, has been abandoned on both sides of the Atlantic, as illogical. The American courts have generally allowed a judgment to be set aside on proof that it rested on an unauthorized appearance, but have been much divided when the judgment came up in a collateral attack upon the rights of a purchaser under it. In a well-considered case in Iowa, the purchase made under a decree based on an unauthorized answer was held void; but there were circumstances drawing suspicion on the decree. Such judgments have also been held "not voidable only, but actually void," in Illinois; and strong dicta, if not direct decisions, to the same effect, are found in Kansas.⁷⁴

⁷² Ferguson v. Crawford, 70 N. Y. 253, 86 N. Y. 609 (evidence against authority too weak); Tallman v. Ely, 6 Wis. 244 (evidence in its support admissible).

⁷³ See Hageman v. Salisberry, *infra*, note 78, and the curious case of an appearance for plaintiff on a forged warrant. Robson v. Eaton, 1 Term R. 62, where Lord Mansfield held that a payment of the money into court, under its order, did not discharge the defendant from his debt.

⁷⁴ An anonymous case in 1 Salk. 88, modifying the rule laid down in 1 Salk. 86, as to all attorneys. See a full review of the authorities in Harshey v. Blackmarr, 20 Iowa, 161; Anderson v. Hawhe, 115 Ill. 33, 3 N. E. 566; Reynolds v. Fleming, 30 Kan. 106, 1 Pac. 61; First Nat. Bank v. Dry Goods Co., 45 Kan. 510, 26 Pac. 56. But in Macomber v. Peck, 39 Iowa, 351, a

The drift of the decisions in favor of the misrepresented party begins with an early case in New York. It has lately become stronger, though not yet universal, and has a strong backing from the supreme court of the United States, which has otherwise gone very far in upholding the sanctity of records. As to judgments of sister states which, by passing upon status, may affect the title to land, it is now fully recognized.⁷⁵

Confessions of judgment by married women, with or without the co-operation of the husband, in states or at times where and when women cannot or could not contract, have generally been held void. This has been most fully considered in Missouri, and put there on the sensible ground that, while the law allows a married woman to sell or incumber her estate only in one way, viz. by a deed acknowledged on privy examination, no other, though indirect, method can be allowed; and the decision has been applied to cases where it seems a judgment upon service of process would have been valid.⁷⁶

The mischievous practice of giving warrants of attorney to confess judgment, before suit brought, prevails in many states, and in Pennsylvania it is recognized and regulated by statute. Judgments are entered on the motion of any attorney who produces the warrant, without any process. In Pennsylvania the prothonotary may even enter a judgment upon such warrant in vacation.⁷⁷ While the act of the latter is strictly construed, there seems to be no escape from the effects of a confession when made by a regular attorney, though the person who gave the warrant was insane at the time, or even

distinction was drawn between void and voidable, and the judgment sustained.

⁷⁵ Denton v. Noyes, 6 Johns. 296 (Chief Justice Kent, Van Ness dissenting), the judgment lien to stand as security for what money adjudged on rehearing; Ellsworth v. Campbell, 31 Barb. 134 (distinction between rich and poor attorney rejected); Price v. Ward, 25 N. J. Law, 225 (with aid of New Jersey statute of 1852, defense admitted); Shelton v. Tiffan, 6 How. 163. As to appearance in sister state, records were controverted with success in Starbuck v. Murray, 5 Wend. 148; Kerr v. Kerr, 41 N. Y. 272 (a fraudulent Indiana divorce).

⁷⁶ Rannells v. Gerner, 80 Mo. 474; Coe v. Ritter, 86 Mo. 277 (quoting Anon., 1 Salk. 399). See contra, Stone v. Werts, 3 Bush (Ky.) 486.

⁷⁷ Pennsylvania, Brightly, Purd. Dig. "Judgments," 41. In Kentucky such warrants of attorney are forbidden, and judgments entered under them wholly void.

though the warrant was forged, if execution has been issued, and lands have been sold to a purchaser in good faith.⁷⁸

While this may be peculiar to Pennsylvania, it seems that in all states, if an attorney is once retained, his action in withdrawing a defense and letting judgment go is so far binding on his client that he cannot in another action attack the judgment when it is pleaded against him.⁷⁹ However, an attorney probably cannot compromise

⁷⁸ Hope v. Everhart, 70 Pa. St. 231 (entered by prothonotary); Weaver v. Brenner, 145 Pa. St. 299, 21 Atl. 1010 (case of lunacy not found by inquest until after judgment and sale); Hageman v. Salisberry, 74 Pa. St. 280 (defense of forged warrant). The attorney who acted under it could prove neither execution nor handwriting. "If a judgment be confessed by an attorney, neither his authority nor the regularity of the judgment can be inquired into in a collateral action," says the court, admitting that the authority of attorneys in Pennsylvania was held higher than elsewhere. All these were ejectments between the heirs and the purchaser under execution.

⁷⁹ Herbert v. Alexander, 2 Call (Va.) 420; Davidson v. Rozier, 23 Mo. 388; Holker v. Parker, 7 Cranch, 452; Vail v. Conant, 15 Vt. 314; Fitch v. Scott, 3 How. (Miss.) 317; Smith's Heirs v. Dixon, 3 Metc. (Ky.) 438 (where collusion between the defendant's and plaintiff's attorney clearly appeared). See, also, Derwort v. Loomer, 21 Conn. 245; Beardsley v. Root, 11 Johns. 464; Filby v. Miller, 25 Pa. St. 264 (where, however, a compromise made in an ejectment suit, by which the attorney got a part of the land sued for, was enforced on the clients after an acquiescence of many years as against the purchaser from the attorney). And so as to long acquiescence. Mayer v. Foulkrod, 4 Wash. C. C. 511, Fed. Cas. No. 9,342. So the attorney in an ejectment cannot, without authority from his client, agree upon a certain line by which judgment is to be entered. Mackey v. Adair, 99 Pa. St. 143; Trope v. Kerns, 83 Cal. 553, 23 Pac. 691. But an attorney can agree that an issue is to be tried in one of two cases against his clients, and the result to bind them in another. Ohlquest v. Farwell, 71 Iowa, 231, 32 N. W. 277. (It is said [page 233, 71 Iowa, and page 277, 32 N. W.]: "An attorney cannot consent to a judgment against his client, or waive any cause of action or defense in the case; neither can he settle or compromise it without any special authority.") An interesting case, arising from an unauthorized appearance and consent decree, lately came before the supreme court of the United States, and was passed on in Robb v. Vos, 155 U. S. 13, 15 Sup. Ct. 4. A lawyer at Cincinnati, as administrator of an estate, invested, in 1885, with the assent of all parties, \$10,000 of the estate on land in that city, on a long-time mortgage, in the name of R. and S., residents of New York, as trustees. In 1887 a judgment creditor of the mortgagor brought suit to wind up his affairs, making R. and S. parties. The lawyer referred to accepted service of the summons without their knowledge, filed an answer and cross petition, and

his client's claim for land, by taking money, or for money by taking land; and, between the original parties, at least, or as against volunteers or purchasers with notice, any agreement of this sort will be set aside upon direct proceedings; but, when the court has based its judgment upon such an agreement, and rights of third parties have grown out of the judgment, by an execution sale or otherwise, it might be impossible to restore the wronged client to his rights.⁸⁰ But, as the attorney has power to conduct a suit, he can join in an agreement to have the issues tried by arbitrators, and the judgment rendered on the award is binding on his client.⁸¹

Where a court appears ready to take jurisdiction of the person of a defendant who has not been lawfully summoned, he may cause counsel to appear specially for him to show that he has not been rightfully brought before the court, and, as long as the efforts of counsel are confined to this one point, jurisdiction of the person is not gained by such appearance; but, if the counsel thus appearing goes further, e. g. if he objects to jurisdiction on general grounds, the defendant's appearance may be considered as being put in, and a valid judgment may be based upon it.⁸²

assented to a decree of sale, in which the mortgage was provided for. Vos, the appellee, and another, bought at the sale, and paid their money into court, which the lawyer withdrew, and converted to his own use, soon thereafter dying insolvent. R. and S. sued Vos for the land, insisting that the decree was void for want of authority. The case went against them mainly on the ground of subsequent action on their part, which estopped them. But needlessly (and this is much regretted by the writer) the court says at the close of their opinion "that the rights of R. and S. were correctly asserted by Kebler in the answer and cross petition filed by him in the case, and that, assuming he was authorized to appear, the decree directing the lands to be sold, and awarding to R. and S. \$10,000 and interest out of the proceeds, was fully warranted. (Quære, could not R. and S. have objected, seeing their mortgage was not yet due?) It follows that by the payment into court of the amount, etc., found due, etc., and by the conveyance to them by the master, etc., in pursuance of the decree, the purchasers became vested with a fee-simple title." This is directly opposed to Robson v. Eaton, supra, the decision wherein had always been followed and approved. If it is correct, R. and S. lost an interest in land without having ever been summoned, or having appeared in the suit.

⁸⁰ Wheeler v. Alderman, 34 S. C. 533, 13 S. E. 673; City Council of Charleston v. Ryan, 22 S. C. 339.

⁸¹ Buckland v. Conway, 16 Mass. 396; Wade v. Powell, 31 Ga. 1.

⁸² Elliott v. Lawhead, 43 Ohio St. 171, 1 N. E. 577. The matter of special

Under laws allowing the defendant to acknowledge the service of a subpoena, it has been held that a solicitor may acknowledge for him; and, where a decree based only on such an acknowledgment and a sale under the decree were attacked on the ground that such solicitor was not authorized to thus enter the defendant's appearance, the attack was disallowed,—though this might be held differently in New York.⁸³

An infant cannot appoint an attorney. Hence it would seem that, where the record shows a defendant to be under age, his appearance by attorney is void, and the judgment, if it rests on that appearance alone, must also be void. The contrary has, however, been lately held in North Carolina, where the conclusiveness of judgments seems to have been carried to the utmost.⁸⁴

The common-law doctrine was that an action at law commenced by capias cannot proceed until the defendant's appearance has been entered of record, and a judgment without such entry is a nullity, though the defendant had been actually arrested. But this doctrine is not in force anywhere since a summons has taken the place of the capias for beginning actions, and is now only matter of history.⁸⁵ As the end and object of all monition, or citation of any kind, is to compel an appearance, a court which has, by monition in proper form, gained jurisdiction over the person and interests of a defendant or claimant, loses it again if it forbids him to appear. All its further proceedings become void. So it has been held, at least, in the matter of confiscation, which is not favored in the law.⁸⁶

or de bene esse appearance is fully discussed in *Winrow v. Raymond*, 4 Pa. St. 501. A special appearance to set aside personal judgment taken on constructive summons does not ratify it, nor can the appearance in a higher court on appeal from that motion have such effect. *O'Reilly v. Guardian Mut. Ins. Co.*, 60 N. Y. 169.

⁸³ *Dickinson v. Inhabitants of Trenton*, 33 N. J. Eq. 63.

⁸⁴ See above, as to voluntary appearance by guardian. Also, 1 Bl. Comm. p. 464. *Contra, England v. Garner*, 90 N. C. 197.

⁸⁵ *Horner v. O'Laughlin*, 29 Md. 465, referring to the works of Stevens and Chitty on Pleadings.

⁸⁶ *Windsor v. McVeigh*, 93 U. S. 274; *Young v. Watson*, 155 Mass. 77, 28 N. E. 1135.

§ 146. Constructive Service.

The present system of proceeding against defendants by name, and yet seeking no personal judgment against them, but only the subjection to its decree of the property, real or personal, which is within the grasp, so to say, of the court, is a system of modern growth. It had probably its origin in the London custom of foreign attachment, which was by British act of parliament extended to the colonies, and made applicable to lands, though under the London custom only chattels and effects could be attached.⁸⁷ The process of outlawry in civil actions, a most clumsy and dilatory way for getting at the goods and effects of a departing or absconding debtor, has also been relied on as showing that proceedings against absent defendants are not unknown to the common law.⁸⁸ Constructive service was also applied from an early day to suits for the foreclosure of mortgages and for the enforcement of liens upon land, to suits for partition and dower, or to quiet a title. In the states which had courts with full equity powers, the new mode of proceedings took the shape and name of "suits in equity," though wholly foreign to the underlying principle of equity jurisprudence, as expounded in the great case of Penn against Lord Baltimore, of acting on property rights only through compulsion on the owner. In many states, not only suits resting on claims against the absent defendant's property, but simple attachments for debt, were drawn into the equitable

⁸⁷ Tomlin's Law Dictionary, "Attachment, foreign, under the custom of London." The earliest case recognizing the custom is quoted from Y. B. 22 Edw. IV. pl. 30.

⁸⁸ In a civil action begun by capias; after that, an alias, a pluries, an exigent with five proclamations, and the quinto exactus, came the outlawry against an absent debtor, with forfeiture of goods and effects, and profits of the land to the crown, from whom the creditor would receive his debt and costs on petition, and the outlawry would then be set aside for some trifling error. See 3 Bl. Comm. 288, and Rex v. Wilkes, 4 Burrows, 2527. Similarly, in chancery, a sequestration could be reached after exhausting process of contempt, but hardly without service of the subpoena. Outlawry was at one time in force in North Carolina, Virginia, and Kentucky, but rendered useless in the two latter states, because non inventus could not be returned on a writ against one not an inhabitant of the county. Snead v. Wiester, 2 A. K. Marsh. 277.

forum. But both in chancery and under a specially ordered jurisdiction on the law side, the seizure of lands, goods, and effects was supposed to confer the jurisdiction, as a seizure of a ship does in admiralty and prize cases. The statute always provided some way of bringing notice home to absent defendants,—generally by a newspaper advertisement, sometimes, in addition thereto, or in lieu of it, by written or printed notices posted in public places,—but the theory prevailed, that the seizure of the property was the best means for informing the owner, which it undoubtedly was, unless the property was wild or unoccupied land. And on this theory the supreme court of the United States sustained an attachment sale made in Ohio in 1809, though the record did not show the publication required by the statute, and showed affirmatively that the defaulting at three terms of court also required, could not have taken place; a case utterly shocking to the modern notions of conveyancers and examiners of titles, but which the court has often since (though not very lately) referred to with approval.⁸⁰

The modern theory, as embodied in the several codes of procedure, is this: There is an action at law or in equity, or, in states which have abolished the distinction, simply a civil action, which is commenced by filing a complaint or petition, and issuing a summons. But if the (or a) defendant is a foreign corporation ("not having an agent in the state" is added in some codes), or is not a resident of the state (which in many states, however, is not a sufficient ground, unless he is absent from it at the time, or cannot be found therein),

⁸⁰ *Voorhees v. Jackson*, 10 Pet. 449. The supreme court seems to have pursued a steady policy in all cases of this sort. Wherever the land was sold for a price, fair at the time, and the case was free from fraud and oppression, and the attempt to overhaul the judgment and sale under it was evidently prompted by the great rise of land values in the meantime, the court would shut its eyes to many irregularities. Otherwise where property was sold for much less than its value at the time, and an intention appeared, especially on the part of the plaintiff's attorney, to take advantage of the absent or of the helpless. It is not disrespectful to the court for a text-book writer to say so, for the court has in many of its opinions on both sides of the question fairly avowed that it was swayed by such considerations. In the case quoted the sale took place when Cincinnati was a straggling village; the contest was made when it had become a wealthy city. The state courts have in cases of this kind been much more duly technical.

or has been absent from the state for four (or "six") months, or has departed from the state to defraud his creditors, or keeps himself concealed so that a summons cannot be served upon him, or has left the county of his residence to avoid the service of a summons, the plaintiff may, instead of the ordinary summons, and without otherwise changing the character of the action, have a "warning order" or "order of publication," which is simply the substitute for a summons, and for the service thereof. If the law as to the obtaining and carrying out of this order is followed, the defendant is thereby "brought before the court." It has jurisdiction, and errors in its subsequent action do not affect the validity of the judgment. For instance, the modern codes require that the allegations of the complaint must be proven; also, that no judgment giving the proceeds of the property to the plaintiff can be entered without the execution of a bond to refund them to the defendant if he comes into court in time and defends with success. Yet to render judgment without proof, or without a refunding bond, is only error.⁹⁰ However, in Pennsylvania and Delaware the old theory of foreign attachment still prevails; that is, the levy of the attachment itself is a sufficient notice to the defendant of the proceedings against the attached goods or

⁹⁰ New York, Code Civ. Proc. § 433 (here the grounds for publication, for service outside of the state, and for "substituted service" within the state are all thrown together); Indiana, Rev. St. § 318, giving five grounds for an order of publication; Kentucky, Code Prac. § 57, gives seven grounds (the last that the names of the defendants are unknown), all independent of the cause of action; Minnesota, c. 66, § 64, sets out six causes for publication of summons, much as in New York. In the states which have no complete Code of Procedure, the order of publication is interwoven with the remedy against nonresident or absconding defendants in each particular kind of action, and especially with the "foreign attachment." So in Pennsylvania, New Jersey, and Illinois. In Pennsylvania, there is no general mode of reaching absent defendants. But as explained in *Coleman's Appeal*, 75 Pa. St. 441, in real actions the absent defendant is reached by the agent or tenant on the land; in suits on mortgages and records, by the return of two nihilis to scire facias; in foreign attachments, by the levy,—leaving only a few cases in equity, or in the orphans' court, or revivors, to process of publication. As to non-residence by itself not being good ground for constructive service, see *Carlton v. Carlton*, 85 N. Y. 313 ("It is a known fact that persons who are residents of one state have places of business and do business in another"; proceeding vacated on direct attack).

lands.⁹¹ But if the law as to the "warning order" or "order of publication" is not complied with, and the defendant does not appear voluntarily, he is said not to be "before the court." He is *coram non judice*, and all judgments and orders in the case that affect him or his property are null and void. And, as regards compliance with the law, which tells what does and what does not bring the defendant before the court, there can be no distinction between error or irregularity on one side, and nullity on the other. If the defendant was erroneously thought to be before the court, and dealt with accordingly, the judgment is void.⁹² However, the courts of Kentucky, under the old system of practice, and those of Indiana and Iowa (and perhaps of some other states), under the new system, have repeatedly, in refusing to treat a judicial sale as void by reason of defects in constructive service, said that such defect renders the judgment at most erroneous, but not void. These sayings do not, however, prove the distinction, as long as similar cases have not occurred in which defects of the same kind were reviewed on appeal or error.⁹³

⁹¹ Pennsylvania, Purd. Dig. "Foreign Attachment," 17. And see exposition of Pennsylvania law for reaching absent defendants in *Coleman's Appeal*, 75 Pa. St. 441.

⁹² This is clearly the doctrine of *Galpin v. Page*, 18 Wall. 350. The supreme court of California having reversed a decree for selling the land of Franklin Gray, rendered on constructive service, on the ground that the service had not been properly made, the supreme court of the United States, without asking wherein the defect lay, declared the sale of her interest to be null and void. *Voorhees v. Jackson* is clearly overruled; and the court was applauded throughout the country for thus retracing its steps. Where a man has been irregularly summoned, e. g. by an unauthorized officer, or in the wrong place, he yet has knowledge, if not legal notice, of the pending action, and has only himself to blame if, having a defense, he does not defend; but a constructive service is a mere creature of the law, and, unless the law be pursued in all things, there is an absence both of power and of reason or justice for taking his property from him.

⁹³ *Denman v. McGuire*, 101 N. Y. 161, 4 N. E. 278, distinguishing between void and erroneous judgments; *Quarl v. Abbott*, 102 Ind. 233, 1 N. E. 476; *Jackson v. State*, 104 Ind. 516, 3 N. E. 863; *Essig v. Lower*, 120 Ind. 239, 21 N. E. 1090; *Ballinger v. Tarbell*, 16 Iowa, 491. The present Kentucky Code of Practice forbids an appeal from a void judgment. It is to be treated as void, not as erroneous. In an Indiana case it is said there is more reason for liberality about constructive than about actual service, as the judgment given

Where a suit against an absent defendant is not based on any interest in or lien on his property, but such lien is sought through the suit, a valid judgment can, in modern practice, be gotten only by two prerequisites: First, the ordinary constructive process against the defendant; next, the seizure of the property by the officer of the court,—and, as land is not seized in any bodily sense, this means the lawful levy of a lawful attachment. In short, an unsecured creditor without judgment can subject an absent defendant's lands to his own demand only by attaching them.⁹⁴ And a valid attachment can, under the Codes of Practice, be only obtained "at or after the beginning" of the suit; a valid summons must be issued, or valid "warning order" or order of publication must precede the writ or order of attachment.⁹⁵

Can a court obtain jurisdiction against an absent defendant upon the ground that he is a nonresident, or is otherwise within the law authorizing proceedings against absent or absconding defendants, when he is not so in fact? Can a judgment rendered on constructive service be collaterally attacked on the ground that the defendant was in fact a resident, and as such entitled to personal service? Under many of the state laws, the clerk grants the warning order. The court does not pass on the question of the defendant's residence, but, assuming that he is a nonresident, and as such properly brought before it, gives judgment on the merits. In a case involving a great estate, and much bitter feeling, the court of appeals of Kentucky

on the latter may be opened within a number of years. In Kentucky, before the "Code," see distinction between void and erroneous in *Sidwell v. Worthington*, 8 Dana, 74.

⁹⁴ *Grigsby v. Barr*, 14 Bush (Ky.) 330, under section 418 of the Kentucky Code of Practice ("no lien on the property of a defendant constructively summoned shall be created otherwise than by attachment or by judgment"; which means a previous judgment). See, contra, under older law, *Scott v. McMillen*, 1 Litt. (Ky.) 302. A lawful levy is material, *Bailey v. Beadles*, 7 Bush (Ky.) 383; proper ground for the attachment is not, *Paul v. Smith*, 82 Ky. 451; *Cyphert v. McClune*, 22 Pa. St. 195. Contra, dictum in *Denman v. McGuire*, 101 N. Y. 161, 4 N. E. 278; *Drake, Attachm.* § 876. As to description of attached property, see hereafter, under "Judicial Sales."

⁹⁵ *Kellar v. Stanley*, 86 Ky. 240, 5 S. W. 477 (where the summons issued was void); *Kerr v. Mount*, 28 N. Y. 659 (under New York law which did not consider suit begun till summons was served; which was amended in 1866 so as to make issue of summons beginning of action).

gave dower to a wife against whom a decree of divorce had been rendered on "warning order," when she had her domicile in the state, treating the divorce as void. But the opinion is mainly based on the ground that the law allows neither appeal nor review to correct a judgment for divorce.⁹⁶ The weight of authority on the subject in other states is altogether against the right of collateral attack on this ground. No decision is directly in its favor.⁹⁷

Where, during the Civil War, men had been expelled by the military authorities from the states of their abode, and were then sued by their creditors, and judgments were given against them upon service by publication, the supreme court of the United States treated sales under these judgments as void. This was on the ground that the warning conveyed to men who physically could not, and by law might not, come forward to appear, nor even to receive any communication concerning the cause, was idle and worthless; and that the defendants had never had their "day in court."⁹⁸ In Kentucky, soon after the outbreak of the Civil War, when many of her citizens joined the Rebellion, and went within the Confederate lines, either within or without the state, the legislature made it a ground of attachment, as well as of warning order, to go there voluntarily and either

⁹⁶ Newcomb's Ex'rs v. Newcomb, 13 Bush (Ky.) 544. The point was complicated with the other that, by the plaintiff's act, the defendant constructively summoned was prevented from appearing; but on the main ground,—the voidness of the warning order when the defendant is not in fact a non-resident, or otherwise within the statute,—no authority was quoted by court or counsel. But see cases in next note in which the fact on which the decisions rested appeared only dehors.

⁹⁷ Hammond v. Davenport, 16 Ohio St. 177; Cincinnati, S. & C. R. Co. v. Village of Belle Centre, 48 Ohio St. 273, 27 N. E. 464; Lawson v. Moorman, 85 Va. 880, 9 S. E. 150; Jermain v. Langdon, 8 Paige, 41, only holds that a defendant constructively summoned, but entitled to personal notice, may open the decree without paying costs. It was before a sale. In Pennoyer v. Neff, 95 U. S. 714, there is a dictum that nonresidence is a jurisdictional fact; but the bearing of the remark is not followed out. In Covert v. Clark, 23 Minn. 539, judgment on publication against resident, who had not concealed himself, was avoided by direct attack. Whether a nullity, was left undecided. Wortman v. Wortman, 17 Abb. Pr. (N. Y.) 66, and Equitable Life Assur. Soc. v. Laird, 24 N. J. Eq. 319, take ground against the right to annul.

⁹⁸ Dean v. Nelson, 10 Wall. 172; Lasere v. Rochereau, 17 Wall. 437.

join the Confederate army or to stay there 30 days. The law was the only alternative to giving these men, as reward for their unlawful act, an indefinite stay on their debts; and, though it might have been impossible for many of them to return and answer, decrees under this law were sustained.⁹⁹

The court, having gained jurisdiction by having the defendant's land within its power, and by a valid warning order or publication, can the plaintiff by amendment enlarge his cause of action? On principle it seems that he cannot. The defendant, being notified in the eye of the law only, is before the court only for the purposes of the action as it stands when he is supposed to be summoned; and a judgment for anything else should be deemed void, aside from any provisions of the law requiring the cause of action to be set out in the published notice.¹⁰⁰

§ 147. Defects in Constructive Service.

The course prescribed by the state laws to bring defendants before the court by other means than the ordinary service of a summons or notice is, in its main outlines, the following:

First, the facts must be made to appear to the court by reason of which such extraordinary service is necessary and is authorized by law. This is generally the affidavit of the plaintiff or of his agent or attorney, or of some other person, that the defendant "resides out of the state," is a foreign corporation having no agent in the state, or is otherwise within the grounds for constructive service; or the facts may, in some cases at least, be shown by the return of the officer who returns the summons, the latter course being a reminiscence of the old outlawry. In some cases both affidavit and return must concur.

Next, there is an order made by the court, or by its judge, in some states by its clerk, or indifferently by the court or clerk, or by the judge or a commissioner of the court, directing publication to be made in some newspaper for the length of time or number of insertions named in the order, warning the defendant to appear at a

⁹⁹ Thomas v. Mahone, 9 Bush (Ky.) 111; Paul v. Smith, S2 Ky. 451.

¹⁰⁰ Stewart v. Anderson, 70 Tex. 588, 8 S. W. 295. The judgment was held void on the first cause of action, as well as on the second.

named term, or on or before a named day, and then to answer; or, in old-fashioned chancery proceedings, "to answer, plead, or demur to the bill." The order may also direct a mailing of a copy to the defendant. In Kentucky no publication in a newspaper is ordered. The clerk simply puts upon the petition, complaint, bill, etc., a "warning order," and the court or its clerk appoints an attorney to defend for the absent defendant, whose first duty it is to write and mail to him information as to the nature of the suit brought. As a means for conveying information of the suit brought, this method is much more effective than the newspaper notice.¹⁰¹ Such "warning order," and the appointment of an attorney and the lapse of the prescribed time, are alone sufficient to bring the defendant into court.¹⁰²

Third, where the publication is ordered, it must also be made, and proof, generally in a mode pointed out by the statute, must appear in the record, that it has been made, and how it has been made.

As to the first step, it is the better opinion that the absence of the affidavit on which the order of publication or warning should be based is not fatal to the validity of the judgment, especially if such order recites the grounds upon which it is granted, e. g. "it appearing to the satisfaction of the court that the defendant A B does not reside in this state, it is ordered," etc.¹⁰³ Where the statute, as in Kentucky, says that in 30 days after the making of the warning order and appointment of attorney the defendant is deemed to be summoned, we have no right to interpolate the further condition that an affidavit has been filed before such warning order.¹⁰⁴

¹⁰¹ In New Jersey the rule of court requires a publication in a newspaper in the state in which the defendant is supposed to reside (*Oram v. Dennison*, 13 N. J. Eq. 438); but the neglect of this rule would not avoid the judgment.

¹⁰² The writer has, in his "Kentucky Jurisprudence" (page 246), committed himself to this position, on the plain words of the statute. The court of appeals has never gone quite so far in its opinions, but has always sustained the judgment when it would be valid under this view, always, however, on narrower grounds. See *Wilson v. Teague*, 95 Ky. 147, 23 S. W. 656; *Sears' Heirs v. Sears' Heirs* (Ky.) 25 S. W. 600.

¹⁰³ *Newcomb's Ex'rs v. Newcomb*, 13 Bush (Ky.) 371; *Hardy v. Beaty*, 84 Tex. 562, 19 S. W. 778; *Cason v. Cason*, 31 Miss. 578; *Banta v. Wood*, 32 Iowa, 469; *Ward v. Lowndes*, 96 N. C. 367, 2 S. E. 591; *Sloan v. Thompson*, 4 Tex. Civ. App. 419, 23 S. W. 613.

¹⁰⁴ In *Sears' Heirs v. Sears' Heirs* (Ky.) 25 S. W. 600, the jurat to the affidavit was unsigned. Held not to avoid the judgment against collateral at-

In Michigan an order of publication in equity cases may be had against a defendant residing in the state, upon affidavit that process for his appearance has duly issued, but could not be served by reason of absence from or concealment within the state, or continued absence from place of abode. It has been held, under this clause, that the summons must have run out to its return day before the affidavit can be made and publication ordered. If this be done before the return day, the order, decree, and sale under it are all void.¹⁰⁵

In New Jersey, nonresidence or absence from the state is, as in New York, if proved to the satisfaction of the court, a ground for ordering the service of the summons outside of the state, or for process by publication, the former mode being favored; and in the latter case the affidavit must give the defendant's post-office address, that a copy may be mailed to him.¹⁰⁶

But these words "to the satisfaction of the court," used here and in the laws of many other states, both as to the award of publication, and again when it comes to the proof that publication has been duly made, are of great importance. The court having once been "satisfied" that there are grounds for the order, its decision on that point cannot be drawn into dispute in another suit. Thus, while a

tack, after lapse of many years. The decision was not put on the plain ground stated in the text. In *Harlammert v. Moody's Adm'r* (Ky.) 26 S. W. 2, the warning order was not "on the petition," but on the back of a loose paper containing the affidavit of nonresidence. Held good nevertheless. In Indiana, a judgment was held to be void collaterally in *Brenner v. Quick*, 88 Ind. 546, because the affidavit for the order of publication did not state the cause of action, nor that the defendant was a necessary party.

¹⁰⁵ Michigan Ann. St. § 6670; *Soule v. Hough*, 45 Mich. 418, 8 N. W. 50, 159 (Cooley, J., dissenting). It was also held fatal that the affidavit of inability to serve defendants was not made by the officer, who alone could swear to it at first hand. The majority refer to *Evarts v. Becker*, 8 Paige, 506, Judge Cooley to *Sitzman v. Pacquette*, 13 Wis. 291, which is rather against him. Minnesota (chapter 66, § 64) has grounds somewhat like those in Michigan, on which service outside the state or by publication can be ordered. The Wisconsin cases of *Slocum v. Slocum*, 17 Wis. 150, and *Rankin v. Adams*, 18 Wis. 292, also annul the whole proceeding for a flaw in the affidavit, but could hardly have been so decided under the present statute. *Rogers v. Rogers*, 18 N. J. Eq. 445.

¹⁰⁶ New Jersey, Revision, "Chancery," 18.

court might refuse to grant the order, upon an affidavit which is not definite about the defendant's post-office address, yet, if the publication is ordered and made, and judgment rendered, it is, on principle, too late to object; though there are states in which lesser defects in the affidavit have been held fatal.¹⁰⁷

Where the affidavit is deemed essential, the question arises whether it must be positive or may profess to be made on information and belief. The latter form was deemed good enough, on collateral attack, both in New York and in Kansas.¹⁰⁸

Under the Kentucky statute requiring the clerk to make the warning order "on the petition," such order written out on the back of a separate affidavit, filed some time later than the petition, was held valid, so as to support the judgment.¹⁰⁹

Some of the practice acts (e. g. the Kentucky Code of Practice) prescribe an affidavit in which nothing is to be stated but the nonresidence, absence, departure, or concealment of the defendant; and upon this (provided the action has been otherwise commenced) the order of publication or warning may be founded. But in other states the cause of action must also be sworn to before the order for publication, or other substituted service, can pass, either, as in New York, in a "verified complaint," or in the affidavit on which the order of publication is asked. The omission altogether to state a cause of action has in Indiana not been held fatal;¹¹⁰ but it must be so in Kansas and Nebraska, and was so, at least under the former statute, in Wisconsin. As to the effect of a too general, or otherwise defective, statement of the cause of action, the authorities even in these states differ.¹¹¹

¹⁰⁷ *Ward v. Lowndes*, *supra*; and many of the cases above. But in Minnesota judgments were held void for defects in the affidavit, or because it was not filed in time. *Barber v. Morris*, 37 Minn. 194, 33 N. W. 559; *Brown v. St. Paul & N. P. Ry. Co.*, 38 Minn. 506, 38 N. W. 698. In Nebraska, the affidavit to authorize publication being filed after first publication made, a judgment was held void. *Murphy v. Lyon*, 19 Neb. 689, 28 N. W. 328.

¹⁰⁸ *Van Wyck v. Hardy*, 39 How. Prac. 392; *Harrison v. Beard*, 30 Kan. 532, 2 Pac. 632.

¹⁰⁹ *Harlammert v. Moody's Adm'r (Ky.)* 26 S. W. 2.

¹¹⁰ *Carrico v. Tarwater*, 103 Ind. 86, 2 N. E. 227, following *Dowell v. Lahr*. 97 Ind. 146.

¹¹¹ *Essig v. Lower*, 120 Ind. 239, 21 N. E. 1090 (not void, as an omission of (1100)

The most material part in the "order" is the naming of a time by which the defendant must answer. If a shorter time is given him than the law directs, the order is void, and is not helped out by continuances of the case made afterwards, by which the defendant gets all the time for answering to which he is entitled.¹¹²

Where the statute requires the cause of action and relief prayed to be published, a general statement, which informs the defendant, if it should come to his eyes, is enough. A variance between the complaint and publication will not invalidate the judgment.¹¹³ The defendant to be affected must be named in the publication. In other words, constructive service does not turn an action into a proceeding in rem. This becomes more evident in the states in which an effort to mail a copy of the publication is required.¹¹⁴ More formal objections have generally been overruled; e. g. that the place of business of the plaintiff's attorney was stated only in a kind of postscript, or the county in which the court was held not expressly named, when it appeared sufficiently otherwise.¹¹⁵

The appointment of an attorney for the absent defendant is most essential, it being, where the statute provides for it, the most reliable, perhaps the only, means for bringing knowledge of the pendency of the suit home to him. The present Kentucky Code of Practice says that the defendant against whom a warning order is made and

the cause of action is not fatal in Indiana); contra (where the affidavit did not show that it was a cause in which the law allows publication), *Harris v. Claflin*, 36 Kan. 543, 13 Pac. 830; *Nelson v. Rountree*, 23 Wis. 367, under an older statute of Wisconsin. Affidavit that cause of action is within the law said to be sufficient: *Claypoole v. Houston*, 12 Kan. 324. Insufficient: *Atkins v. Atkins*, 9 Neb. 191, 2 N. W. 466. Judge Van Fleet, from whose book the authorities in this and the preceding note are taken, is right in reprobating any strictness on this subject, as the complaint furnishes all the information to judge or defendant as well as the affidavit can do.

¹¹² *Brownfield v. Dyer*, 7 Bush (Ky.) 505; *Miller v. Hall*, 3 T. B. Mon. 243 (where the "April Term" was named for appearance without stating in what year).

¹¹³ *Woodbury v. Maguire*, 42 Iowa, 339. See section 146, note 99.

¹¹⁴ *Chicago & A. R. Co. v. Smith*, 78 Ill. 96.

¹¹⁵ See a number of formal objections brushed aside in *Connely v. Rue*, 148 Ill. 207, 35 N. E. 824, where but little stress was laid on laches in bringing this suit, it being plain that the parties in interest knew of the pendency of the suit.

for whom an attorney has been appointed, is before the court on the thirtieth day thereafter; hence, if no attorney has been appointed, the judgment is void.¹¹⁶ But, the attorney having been appointed, his failure to do his duty by seeking to communicate with the defendant, or to report to the court what he has done in that regard, or to make any attempt at a defense, is immaterial, and the court may proceed to render judgment nevertheless, which will be not only valid, but not even erroneous on that account.¹¹⁷

The mode of publication has given a great deal of trouble. The statute in many states prescribes the number of insertions, or the length of time during which the summons or order to answer must be published; and if the record shows that the publication has fallen short of this, or that the judgment has been entered before this time has elapsed, there would be a want of jurisdiction.¹¹⁸ And so if the order of court, under a discretion left to it by the statute (as in New Jersey), names the time or number of insertions, and a shorter time is given, or fewer insertions are made.¹¹⁹ So also, if the order names the paper, and the publication should be made in another. But here the curing effect of the "proof to the satisfaction of the court" would come into play; it having once been decided by a "superior court" that the publication has been made in the right newspaper, this is res adjudicata.¹²⁰

¹¹⁶ Kentucky, Code Prac. § 60. The Code of 1854, and the statutes in force when Atchison v. Smith, 3 B. Mon. 502, and Thomas v. Mahone, 9 Bush, 111. were decided, were worded otherwise. And see Hanscom v. Tower, 17 Cal. 518.

¹¹⁷ Brown v. Early, 2 Duv. 369; Ball v. Poor, 81 Ky. 26. Quære under section 59, subd. 7, Kentucky Code Prac., requiring a defense where the absent defendant is an infant or non compos.

¹¹⁸ Brooklyn Trust Co. v. Bulmer, 49 N. Y. 84 (less than 42 days, which is implied in six weekly insertions); Cravens v. Dyer, 1 Litt. (Ky.) 153 (eight weeks not enough where statute said two months [under an act long ago repealed]).

¹¹⁹ Karr v. Karr, 19 N. J. Eq. 427.

¹²⁰ McCahill v. Equitable Life Assur. Soc., 26 N. J. Eq. 531, before the court of appeals of New Jersey. The decision is made against a bidder who refused to comply with the terms of sale because the notice ordered for publication in the Long Branch Times was published in the Long Branch News (the only paper there). The court was emphatic that there should be no doubt on the question, as any doubt would be disastrous to judicial sales.

As to the form of the notice, there is an intimation in a New Jersey case that the direction in the statute not to entitle the published notice as of the case must be obeyed at the risk of an invalid decree.¹²¹ But the omission to name the state in which the court is held is immaterial where there is enough in the advertisement to indicate it; nor is the published summons the worse because part of it is added as a postscript.¹²²

Where the statute directs a copy of the published summons to be mailed, this cannot be dispensed with; and the New York and some other codes of procedure demand "that proof of the deposit in the post office * * * must be made by the person who deposited it."¹²³ Where the statute requires publication for so many weeks, once a week is enough, even if the newspaper is a daily.¹²⁴

Supposing the published notice, as it appears in the record, to be such as the law requires, the manner in which it is proved, has given a great deal of trouble. The older statutes used to call for an affidavit by the "printer," the later ones demand an affidavit by the "printer, his foreman, or principal clerk"; and this affidavit is in the nature of a return of process. Judgments have been held void, not only because the "editor" instead of the "printer" made the affidavit, but because the "principal clerk" who swore to the publication of the slip attached to his affidavit did not swear that he was the principal clerk,—a state of law which certainly calls for revision.¹²⁵

And so in *Applegate v. Lexington & C. C. Min. Co.*, 117 U. S. 256, 9 Sup. Ct. 742. Where the law says nothing about the proof of publication appearing in the record, the pro confesso entry is enough. It shows that the court passed on the question. So, also, *Sidwell v. Worthington*, 8 Dana, 74.

¹²¹ *Karr v. Karr*, 19 N. J. Eq. 427.

¹²² *Cook v. Kelsey*, 19 N. Y. 412.

¹²³ *New York*, Code Proc. § 444; *Hallett v. Righters*, 13 How. Prac. 46.

¹²⁴ *Dayton v. Mintzer*, 23 Minn. 393 (case of advertising a sale).

¹²⁵ Under a Kentucky act of 1803, making the certificate of "the printer," with the copy of the publication attached, proof of the insertions, "editor" was in the older cases held the same as "printer"; but in 1831 the distinction was drawn, and then followed up, and certificates by the editor deemed insufficient. *Brown v. Woods*, 6 J. J. Marsh. 18; *Sprague v. Sprague*, 7 J. J. Marsh. 231. And the certificate is bad when the advertisement is not attached. *Ferril v. Combs*, Id. 247. But where the publication is proved by affidavit, and the court was satisfied, it may have been satisfied, outside of

§ 148. Unknown Defendants.

There are actions in which persons wholly unknown to the plaintiff are defendants, and which nevertheless cannot be called actions in rem. The readiest example is that of demand against a debtor who has died, leaving land behind him, and unknown heirs, whether the demand be secured by mortgage or lien, or whether the creditor only avails himself of the statutory right to subject the descended lands by suit in equity or like proceeding. Such suit may also be brought against "unknown heirs or devisees," it being unknown whether the former owner of land, who may have resided in a far-off land, had died intestate or testate, or in what country he had his last domicile. And a suit against such unknown heirs or devisees may be also brought to quiet a title or to establish an equity in land in which the unknown defendants hold the legal title.

Proceedings against "unknown heirs" were introduced in several states about the year 1800; and, being wholly opposed to the theory both of the common law and of the old chancery practice, the statutes which authorized such proceedings were narrowly construed.¹²⁶

It, that the affiant was the printer. Abbott v. Curran, 98 N. Y. 665. And see Bunce v. Reed, 16 Barb. 347. "A B, principal clerk, etc., deposeth that, etc." insufficient. Steinbach v. Leese, 27 Cal. 295. A law requiring a printed copy of the notice to be filed, and its due publication to be proved to the satisfaction of the court, would prevent such miscarriages of justice, though it happened in the last-named case that the judgment declared to be void was incidentally an unjust one.

¹²⁶ Such laws were most needed in the West, to reach wild lands, for which the owners could not be found. The first Kentucky act on the subject, of December 16, 1802, gave a suit in equity to any one who claimed land as a locator, or by bond or instrument in writing, against the heirs to whom a legal title had descended, though their names be unknown, and whether residents of the commonwealth or not, and the order of appearance was to be advertised for eight weeks (not two months). Barclay v. Hendricks, 4 T. B. Mon. 252. This was extended, in 1815, to all suits in chancery against the heirs of any decedent, where the names are not known, on affidavit of complainant to that effect. A defect in the oath (e. g. made by attorney instead of client) only renders the proceeding erroneous. Tevis v. Richardson, 7 T. B. Mon. 657; Jeffreys' Heirs v. Hand's Heirs, 7 Dana, 89; Benningfield v. Reed, 8 B. Mon. 102. For suit against heirs of debtor to reach lands fraudulently conveyed, see Tharp v. Feltz's Adm'r, 6 B. Mon. 616. Unknown devisees or

Indeed, much more strictly than where the order of publication is directed against a known and named defendant. Thus, we shall see that in Alabama the proceedings of a probate court against unknown heirs were held void because the statute provided such steps only in chancery suits;¹²⁷ and, while an order of publication is generally, when made and recognized by the court, held valid, though not based upon the proper affidavit, it has been held otherwise as to an order of publication against unknown defendants.¹²⁸ Yet the addition of the words "if any" after the warning given to the unknown defendants does not vitiate it.¹²⁹

Nearly all the modern codes of civil procedure, following that of New York, place the ground that "the defendant is unknown to the plaintiff," or that the defendant's name is unknown to the plaintiff, or that "after diligent inquiry the defendant remains unknown to the plaintiff," along with the defendant's absence from the state, among those which, when disclosed in an affidavit, justify an order of publication or warning order.¹³⁰ It would seem that, where there are several plaintiffs, such an affidavit ought to be made by each of them, as grave injustice could easily be perpetrated if one of them who knows least about the business is put forward to swear to his want of knowledge, and thus the necessity for personal service can be evaded. Hence, in Wisconsin, and some other states, such oath must be taken by each of several plaintiffs that the names of the defendants are unknown to him;¹³¹ and the oath as to the want of knowledge must generally be direct.¹³²

- In proceedings for partition, either in kind or by sale and division of proceeds, it happens very frequently that the part owner who wishes to separate his share from the others can learn neither the grantees could not be reached under an act allowing suit against unknown heirs.

¹²⁷ *Bingham v. Jones*, 84 Ala. 202, 4 South. 409; *infra*, § 150, note 184.

¹²⁸ *Nelson v. Rountree*, 23 Wis. 367 (where the affidavit failed to state a cause of action) could hardly be thus decided under the present statute.

¹²⁹ *Abbott v. Curran*, 98 N. Y. 665.

¹³⁰ E. g. Kentucky, Code Prac. § 57, subsec. 7.

¹³¹ *Kane v. Rock River Canal Co.*, 15 Wis. 179; *Mecklem v. Blake*, 19 Wis. 397.

¹³² *Bell v. Hall*, 76 Ala. 546, under section 3433 (late section 3774) of Alabama Code.

names, nor even the number, of other owners, often the heirs or devisees of one who died at a great distance in time and space. Where partition is regulated by statute, there is generally a clause dealing with unknown owners; and even in New York, where the aim of the Code is to make process uniform for all kinds of actions, there is this distinction: The order of publication against unknown parties in partition must, aside of the other requisites, contain a "brief description of the property."¹³³ A judgment which operates upon the land of defendants, proceeded against as unknown, cannot be collaterally attacked, by entry or real action, on the ground that the plaintiff really knew (as demandant undertakes to prove) who the owners were.¹³⁴

When, in a proceeding to escheat land to the state for the want of heirs, the order of publication addresses itself to the decedent's "unknown heirs," the judgment of escheat is void; for it can only be justified by the lack of heirs. The title of the state is no better than if there had been no judgment.¹³⁵

A long-felt difficulty has been lately met by legislation in New Jersey, which will probably be soon followed in other states. The holder of a lien or mortgage on land the owner of which has disappeared, whether for the time which raises a presumption of death or for a shorter time, is always at a loss how to proceed. If he assumes that the owner is dead, and goes against the heirs, the judgment is void if it turns out that the owner was alive; and vice versa. The New Jersey act directs that a bill may be drawn in the alternative, showing the reasons for the doubts; and the decree of sale obtained on such a bill will be binding, either upon the original party in interest or on his heirs or representatives, known or unknown, as the case may be.¹³⁶

But the most important procedure against unknown parties is a bill in equity, or action in the nature of a bill in equity, for the distribution of a fund arising from the sale of land among creditors. This may happen in the winding up of an assignment in insolvency,

¹³³ New York, Code Civ. Proc. § 1541. See *Sandford v. White*, 56 N. Y. 359; *Herbert v. Smith*, 6 Lans. 493.

¹³⁴ *Foster v. Abbott*, 8 Metc. (Mass.) 596 (partition suit).

¹³⁵ *Caplen v. Compton*, 5 Tex. Civ. App. 410, 27 S. W. 24.

¹³⁶ New Jersey, Sess. Acts March 23, 1892.

or when an estate is to be distributed under some state law forbidding any preference among creditors, and in states in which decedents' estates are settled in chancery, most frequently in administration suits. The statute always provides some method of advertising for the creditors.¹³⁷ If such advertisement is not made, or is not made in the paper pointed out by law, or not for the requisite length of time, it seems that creditors who do not prove their claims or otherwise appear in the suit are not barred, and their lien upon the land, if they have any, special or general, is not extinguished by the sale.¹³⁸

§ 149. Death or Disabilities.

When the parties have been properly brought into court by process or appearance, the jurisdiction over the person may fail by the death of either party before final action. When, pending a suit which is not strictly in rem, the only plaintiff or the only defendant dies, the judgment or decree thereafter rendered against either of them—or, if there are several defendants, and one has died, the judgment or decree rendered against him—should, upon principle, be void; that is, if the party's death is suggested of record. If it is rendered in name against a dead man, it is in effect a decision against his heirs, devisees, or representatives, who are not parties or privies to the judgment.¹³⁹ If rendered in favor of a dead plaintiff against a liv-

¹³⁷ E. g. Kentucky, Code Prac. § 430; but it seems that creditors who do not appear, have no lien under the Kentucky law.

¹³⁸ In the states in which the administrator sells under license, the creditor must look to the proceeds in his hands, and the heir alone is entitled to notice, as will be seen hereafter. But, where, as in Kentucky and a few other states, a decedent's land can be subjected only by a regular chancery suit, the position of the text would follow on principle. Yet it is difficult to find a reported case. There is some analogy in *Roberts v. Phillips*, 11 Bush (Ky.) 11, where it was held that the bringing of a suit in Kentucky to set aside a preference within the time limited gives each of the creditors a more than equitable lien on the estate, which can only be removed by process and judgment. However, in that case the omitted creditors sued those to whom the estate was distributed, for the money.

¹³⁹ *Haydock v. Cobb*, 5 Day, 527; *Griswold v. Stewart*, 4 Cow. 457, followed in *Stymets v. Brooks*, 10 Wend. 206, which speaks, not of judgment, but of execution. The English cases referred to are *Randal's Case*, 2 Mod. 308,

ing defendant who has not been summoned afresh, nor has appeared in court after his adversary's death, it is a decision by default at the suit of B (the heir or representative) against a man who has been summoned only to answer A (the decedent).¹⁴⁰ This simple rule is, however, subject to many exceptions. Common-law proceedings have always been full of fictions, and of these the antedating of writs (testing them of term before their actual issuance) and the entry of judgments *nunc pro tunc* were among the commonest. Thus, whenever either party died after the court took a case under advisement ("curia advisari vult"), and before a decision had been rendered, the judgment would be entered as of a term and day before such death, so that the delay of the court should not work anybody any injury ("actus curiae nemini facit injuriam").¹⁴¹

Considering the long delays which in the English practice intervened between the verdict at nisi prius and the judgment in term, a statute was enacted to allow the entry of judgment where either party should die in the meantime; and this statute has in most American states, before the day of codes of procedure, been treated as the law of the courts,¹⁴² and has been re-enacted in many of these codes.¹⁴³ But where the law of procedure is embodied in such a

and *Harwood v. Phillips*, 6 Bridg. 473, quoting Fitzh. Nat. Brev. 267. In *Green v. McMurtry*, 20 Kan. 189, plaintiff died before service of summons or attachment, and all proceedings were held void.

¹⁴⁰ *Amyx v. Smith*, 1 Metc. (Ky.) 529, but this does not apply to proceedings in error (or appeal in the nature of error); *Spalding v. Wathen*, 7 Bush (Ky.) 659.

¹⁴¹ *Cumber v. Wane*, 1 Strange, 426, 1 Smith, Lead. Cas. 146; *Stickney v. Davis*, 17 Pick. 169.

¹⁴² 17 Car. II., c. 8, referred to in *Griswold v. Stewart*, *supra*.

¹⁴³ New York, Code Civ. Proc. § 764 (after accepted offer to enter judgment for named amount or after verdict). In Pennsylvania, where the old practice prevails, a judgment entered upon verdict, after the defendant's death, but before it has been suggested of record, was held valid. *McAdams v. Stilwell*, 13 Pa. St. 90. But see *infra* as to this state. In the states in which the superior court is held by a single judge, as is the rule almost throughout the West and South, the judgment is nearly always entered at once upon the verdict; though a motion for new trial suspends it. Hence, such a provision is of only slight importance. See *Hays v. Thomae*, 56 N. Y. 521; *Cox v. New York Cent. & H. R. R. Co.*, 63 N. Y. 414. In *Perry v. Wilson*, 7 Mass. 395, note, the judgment, where the death happened after verdict, and pending an advisement, was entered *nunc pro tunc*.

code, the old distinctions, unless re-enacted, cannot be ingrafted upon it. Hence, where the provisions of a code for the abatement and revivor of pending actions do not except the death of a party after the cause is taken under advisement, the old-fashioned antedating of the judgment would seem unauthorized and void. In New York, where a party dies before the "decision is actually rendered against him, the * * * decision is absolutely void."¹⁴⁴ But where the record of the judgment does not disclose the fact of death, the weight of authority seems to be that it cannot be shown in a collateral attack, but only by proceedings in the nature of an *audita querela* in the same court, because to allege a party's death contradicts the record, at least when such death has taken place before the date of some service of process, or of some appearance recited in the judgment roll.¹⁴⁵ In Pennsylvania, this notion has been carried to an extreme length in their process of enforcing mortgages,

¹⁴⁴ New York, Code Civ. Proc. § 765.

¹⁴⁵ Plommer v. Webb, 2 Ld. Raym. 1415, note, and other authorities quoted in case cited in next note. Why cannot the heirs answer: "We admit that our ancestor was alive at the date of the last appearance, but he was dead before the judgment"? The doctrine is put on broader ground in Spalding v. Wathen, 7 Bush (Ky.) 659. John, a slave, had brought and lost a suit for freedom, and appealed to the court of appeals. The case proceeded there. He died. His death being unknown to counsel or court, the appeal was heard without any suggestion of his death, and resulted in a reversal, return to the court below, revivor there in the name of his administrator, judgment for wages, execution, and levy on the supposed master's land and sale. The execution defendant brought suit to set all things done after John's death aside, on the ground that its happening before the decision in the court of appeals made its mandate a nullity. This was denied, and on another appeal the court said: "Where a plaintiff dies pending his suit, his death may be pleaded in abatement; but the defendant may waive such plea, and permit the cause to be tried on its merits, without revivor" (quoting the Illinois case of Camden v. Robertson, 2 Scam. [Ill.] 508); "and in Case v. Ribelin, 1 J. J. Marsh. 30, in which the plaintiff in the circuit court died before judgment, this court held that the judgment was not void, and that it cannot be corrected but by writ of error to this court." The court then refers to the Code of Practice, § 579 (now 518), (and a similar provision is found in every Code of Procedure), under which a suit to vacate a judgment may be brought, among other grounds, on that of "the death of one of the parties before the judgment," and says that it would have been folly to provide for vacating a judgment that is, without such enactment, already null and void; especially as, in the suit to vacate, a valid defense must be shown.

under an act of 1705, by scire facias. Two returns of nihil, being equal to a return of scire feci, not only authorize a judgment awarding the execution under which the premises are sold, but, as it is the duty of the sheriff to return mortuus est when the mortgagor is dead, the returns of nihil imply that he is still alive; and this implication cannot be gainsaid.¹⁴⁶ In South Carolina, long before the Code of Procedure, a confessed judgment, entered when the cognizor was actually dead, was, in accordance with the old fiction, referred back to the next preceding term, and thus saved as a first lien on the decedent's land.¹⁴⁷ But in New Jersey, though the statute directs that judgments confessed in vacation shall be entered as of the preceding term, it cannot be done when the obligor in the warrant has died before the judgment is entered, and his administrator or creditors may have the entry set aside.¹⁴⁸ In North Carolina, it has been held that where the death of the defendant (it was in an ejectment) was not suggested of record, and the plaintiff in fact did not know of it, the judgment was voidable for "error in fact," and should be set aside by motion entitled of the same cause, and not be attacked collaterally in a new suit. This gives the heirs all the needed relief in such a case, but would not relieve against a sale under the judgment.¹⁴⁹ Where more than one sue as joint obligees, the others may go on as survivors after the death of any one of their number. When one of several defendants dies, his death may render a judgment against the others improper, but not void. When, however, an action for the recovery of land, or for the enforcement of a lien thereon, is brought by or against several persons, so related that upon the death of one his interest falls by

¹⁴⁶ *Warder v. Tainter* (1835) 4 Watts, 270, followed implicitly 53 years later in *Murray v. Weigle*, 118 Pa. St. 159, 11 Atl. 781. The former case is very full in its review of English and American authorities. The latter case is very hard, as the deceased had given the mortgage as guardian on the land of his wards, and there was great doubt as to its validity. Also, *Taylor v. Young*, 71 Pa. St. 91.

¹⁴⁷ *Keep v. Leckie*, 8 Rich. Law (O. S.) 164, an extreme case, considering the South Carolina law on warrants to confess judgment. The same was the course of decision in New York before the Code of Procedure, which abolished all such fictions. *Nichols v. Chapman*, 9 Wend. 452.

¹⁴⁸ *Wood v. Hopkins*, 3 N. J. Law, 263; *Milnor v. Milnor*, 9 N. J. Law, 93.

¹⁴⁹ *Knott v. Taylor*, 99 N. C. 511, 6 S. E. 788, following *Burke v. Stokely*, 65 N. C. 569.

descent to the others, it was formerly the practice to let the cause go on without revivor;¹⁵⁰ at least, a judgment rendered without it was not considered void. But modern codes of procedure do not treat this as a case of survivorship, and it hence would be more prudent not to rely upon a judgment rendered after such death, as far as it affects the dead man's share.¹⁵¹ In Pennsylvania, it has also been held that, under proceedings in the orphans' court to sell the land of a lunatic, the death of the owner before judgment does not render the sale void.¹⁵²

Where a decree is rendered against an infant, impleaded as such, the old practice in equity is to reserve a certain time (generally one year) after his coming of age, within which he might open the case, for error shown, on applying to the court in which the decree was rendered. Most of the modern practice laws make it unnecessary to write out this reservation at large in the decree; but every judgment (at law or in equity) against an infant implies the reservation. At law, the old remedy for setting aside a judgment rendered against an infant or person of unsound mind—where the disability does not appear of record, and the suit had not been conducted as suits against such person should be—was by writ of error coram nobis, in which the fact of disability might be alleged, and, if put in issue, shown to exist by proof.¹⁵³ If the irregularity appeared by record, a writ of error or appeal was and is the remedy; and, under the old practice in equity, a bill of review might also be the proper remedy.¹⁵⁴ Now in all cases in which land or interests are directly decreed to one party from the other, or where one party is decreed to convey the land to the other, and the conveyance, as in the case of

¹⁵⁰ *Beckham v. Duncan*, 5 S. E. (Va.) 690.

¹⁵¹ Kentucky, Code Prac. § 500, sub. 3.

¹⁵² *Yaple v. Titus*, 41 Pa. St. 195.

¹⁵³ *Field v. Williamson*, 4 Sandf. Ch. 613; *Meredith v. Sanders*, 2 Bibb, 101. In this and other Kentucky cases, this writ is always called "error coram vobis."

¹⁵⁴ Kentucky, Code Prac. §§ 391, 518, subc. 8. The Code of Civil Procedure of New York contains no such provision, the right of appeal being deemed sufficient. It forbids, however, the bringing of a suit to quiet the title against persons under disabilities. Most other states have provisions, like that of Kentucky, giving to an infant one year after coming of age, without express reservation in the decree.

persons under disability, is made by commissioner, the reversal, vacation, or "opening" of the judgment or decree, divests the estate which has been gained by it, and restores it to the former owner;¹⁵⁵ and, as long as the right to open the judgment or decree in any of these modes exists, the suit, according to the weight of authority, is deemed to be pending, and a purchaser from the winning party must take the risk of an opening, review, or reversal.¹⁵⁶ But a decree of sale stands on another footing; and an infant who has it set aside in any manner or on any of the grounds stated is only in like position with other suitors who succeed in reversing a decree of sale on error or appeal after their land has been sold, and whose rights will be discussed in another section.¹⁵⁷ That a judgment against a person of unsound mind, where the disability does not appear of record, is not void per se, but only voidable, seems to be the settled law. However, in none of the cases quoted, had the person been found judicially to be of unsound mind when the action or suit resulting in the judgment was brought.¹⁵⁸ And the same may be said as to voidness of judgments given against infants.¹⁵⁹

¹⁵⁵ See under head of "Purchase Pendente Lite," and, in next chapter, under head of "Judicial Sales II."

¹⁵⁶ See hereafter, under "Purchase Pendente Lite."

¹⁵⁷ The Code provisions giving to infant a day after his coming of age are construed in accordance with the old law, as stated in *Mills v. Dennis*, 3 Johns. Ch. 367, 368: "But though, in the case of a foreclosure of a mortgage, the infant has his six months to show cause, yet he cannot then be permitted to unravel the accounts, nor will he be entitled to redeem the mortgage by paying what is reported due. He is only entitled to show error in the decree" (quoting *Mallack v. Galton*, 3 P. Wms. 352, etc). If, however, instead of foreclosing the mortgage against the infant heir of the mortgagor, etc., it be decreed that the lands be sold to pay the mortgage debt, then it seems to be understood that the sale will bind the infant. *Booth v. Rich*, 1 Vern. 295. When infant opens, *Bickel v. Erskine*, 43 Iowa. 213. In *Hull v. Hull's Heirs*, 26 W. Va. 1, it is said that to let infants set aside sales after coming of age would upset judicial sales and deter bidders.

¹⁵⁸ *Wood v. Watson*, 107 N. C. 52, 12 S. E. 49; *Thomas v. Hunsuker*, 108 N. C. 720, 13 S. E. 221, quoting all the late text-books on Judgments (1 Black,

¹⁵⁹ In *McMillen v. Reeves*, 102 N. C. 550, 9 S. E. 449, a judgment was held valid in which an infant plaintiff (not described as such in the record) was represented by attorney, said to have acted without authority. In *Etter v. Curtis*, 7 Watts & S. 170, a plea of infancy was allowed in proceedings on a confessed judgment.

While the answer of a guardian, or even of a guardian ad litem, curator, or committee, has often helped out the lack of process, on the other hand, when the process has once been properly served on an infant, or on a person of unsound mind, the failure of the guardian, guardian ad litem, curator, or committee, or even the failure to appoint a guardian ad litem for an infant or non compos who has no regular guardian or committee, does not, generally speaking, render a judgment void, though its rendition is undoubtedly error.¹⁶⁰

In the states in which the disabilities of married women have not been removed, there have always been many cases in which a personal judgment for money against husband and wife would be proper; on a contract made before marriage, or for torts committed by the wife, either before or after marriage. Although, therefore, a well-founded judgment for the payment of money might often be pronounced against a married woman, and to render such a judgment upon pleadings which do not authorize it seems no more than an error, yet in several states there are reported decisions (the latest in Kentucky and Missouri) declaring such judgments, when not supported by a proper state of facts in the complaint or petition, to be not erroneous merely, but void on collateral attack.¹⁶¹

205; Freem. Judgm. § 142) and Executions (Freem. § 22). But see dictum in Bean v. Haffendorfer, 84 Ky. 685, 2 S. W. 556, and 3 S. W. 138, intimating that a judgment against an insane person, though not found to be such judicially, might be attacked collaterally, since the Code of Practice of 1876 requires the summons for any insane person to be delivered to the person in charge.

¹⁶⁰ Porter v. Robinson, 3 A. K. Marsh. (Ky.) 253; Barber v. Graves, 18 Vt. 290; White v. Albertson, 3 Dev. (N. C.) 241; Timmons v. Timmons, 6 Ind. 8; Bloom v. Burdick, 1 Hill (N. Y.) 130 (to be discussed hereafter); Randalls v. Wilson, 24 Mo. 76; Allen v. Saylor, 14 Iowa, 435; Drake v. Hanshaw, 47 Iowa, 291; Simmons v. McKay, 5 Bush (Ky.) 25. But see exceptions in statutory proceedings for sale of infants' land hereafter.

¹⁶¹ Spencer v. Parsons, 89 Ky. 577, 13 S. W. 72; Id., 83 Ky. 305. But the court in Sales v. Cosgrove (Ky.; March, 1894) 25 S. W. 594, refused to carry the point any further. In other states similar decisions have been rendered. Griffith v. Clarke, 18 Md. 457; Morse v. Toppan, 3 Gray, 411 (but see Massachusetts act of 1855 as to women traders); Hugus v. Dithridge Glass Co., 96 Pa. St. 160, following case (Hecker v. Haak) in 88 Pa. St. 238; White v. Foote Lumber & Manuf'g Co., 29 W. Va. 385, 1 S. E. 572 (see Code of 1891, contra);

§ 150. Judgment to Sell Decedent's Land.

Throughout the United States the lands of decedents have for a long time been assets for the payment of debts. In some of the colonies they were always such. But as the administrator, and unless the will otherwise directs, also the executor, is vested only with the goods and effects of the deceased, he cannot sell the lands without gaining some additional powers. It is true, as we have seen in the first section of our chapter on "Descent," that in New Hampshire, in Georgia, in Michigan, and to a lesser degree in other states, the lands of the decedent vest in the personal representatives (the Georgia reports show cases like "Doe on the demise of Smith's administrator"); yet even there he cannot sell the lands of the succession without leave of court.¹⁶²

In a few states the only means by which a judgment or order can be obtained for selling descended or devised lands for the payment of the decedent's debts, funeral and administration expenses, or legacies, is a suit in equity, or a proceeding which, by the words of the statute, is to be carried on as nearly as is possible like a bill in equity; and this may generally be instituted not only by the administrator, but by any creditor, heir, distributee, devisee, or legatee. This jurisdiction is a statutory extension of that which the chancellor in England had for a long time exercised in cases in which

Higgins v. Peltzer, 49 Mo. 152; Alexander v. Lydick, 80 Mo. 341, and see other Missouri cases in section on "Appearance." However, married women can now make contracts in that state. But the sounder doctrine that such judgments are not void has been held in other states. Wingfield v. Rhea, 73 Ga. 477; Wright v. Wright, 97 Ind. 444; Van Metre v. Wolf, 27 Iowa, 341; Wilson v. Coolidge, 42 Mich. 112, 3 N. W. 285; Vantilburg v. Black, 3 Mont. 459; Roraback v. Stebbins, 33 How. Prac. 278; Vick v. Pope, 81 N. C. 22; McCurdy v. Baughman, 43 Ohio St. 78, 1 N. E. 93; U. S. v. Gayle, 45 Fed. 107 (in South Carolina); Howell v. Hale, 73 Tenn. 405; Howard v. North, 5 Tex. 290. As in nearly all these states married women can now bind themselves by contract, judgments hereafter rendered against them are on their face valid, and these decisions, therefore, of but little importance. In McKinney v. Brown, 130 Pa. St. 365, 18 Atl. 642, the judgment against the feme was declared void, because rendered by default, and thus gave no opportunity to prove that the contract was for necessaries.

¹⁶² Georgia, Code, §§ 2556-2560. Compare chapter on "Descent," § 15.
(1114)

the will charged the lands with debts, and thus turned them into equitable assets. Such suit is necessary in Virginia, West Virginia, and Kentucky, in Maryland, and since 1887, by an amendment to the law on administration, also in Illinois. There may be a judgment to sell in order to pay only one or more creditors, or in order to "wind up" the estate by selling enough to pay all demands. All parties who have liens or interests of any kind may be brought in, and must be, if it is desired to bar their claims. As in other cases in chancery, the court aims to sell a perfect title. In these states the sale is to be made, like other chancery sales, by the commissioner or "trustee" of the court; and the validity of the decree is governed by the rules already discussed.¹⁶³ In most other states (except South Carolina, where the probate judge himself sells) the executor or administrator applies for an order or decree, allowing him to sell, either to pay debts, or in some states also to raise the family allowance, support of children, legacies, even for distribution, according to the local law. He applies in a somewhat summary way, generally to the probate court, where there is one, acting differently from the courts of general jurisdiction. The certified copy of the order or decree is known as his "license." The records and papers in these proceedings are often very loosely kept. The proceedings themselves are mostly *ex parte*, and loosely carried on. They have given rise to much litigation.

The title of the purchaser rests, indeed, on two judgments: First, the order granting letters testamentary or administration; second,

¹⁶³ Kentucky, Code Prac. § 429 et seq.; Tennessee, Code, §§ 3171, 3172. Jurisdiction is given in estates under \$1,000 to the county court alone, over larger estates concurrently with the chancery court; but it must proceed like the latter. In Illinois, since 1887, the proceedings though in the county court proceed entirely as bills in chancery (chapter 3, §§ 97-106). Virginia, Code, § 2667 et seq.; West Virginia, chapter 86, § 5 et seq.; Maryland, Gen. Pub. Laws, art. 93, § 75 (though orphans' court has jurisdiction in smaller cases). In North Carolina the chancellor is said to have inherent jurisdiction to sell for a decedent's debts. *Sutton v. Schonwald*, 86 N. C. 198; *Doe v. Harrington*, 11 Ired. 616; *Hinton v. Powell*, 1 Jones, Eq. 230 (administrator's joining with creditors does not take away jurisdiction); but see *Woelfel v. Evans*, 74 Md. 346, 22 Atl. 71. The Kentucky Code of Practice provides a reference to the master to ascertain amount for which to sell; but in *Harlammert v. Moody's Adm'r* (Ky., 1894) 26 S. W. 2, it was held that a sale made without a master's report to sell all the devised lands was not void.

the license. The former, as well as the latter must be valid, to sustain the title. Where the administrator has to bring suit in a court of equity, which sells the decedent's lands by a decree against the heirs, through its master or commissioner, or through the sheriff, all flaws in the administrator's title are cured. The judgment is, at most, erroneous, if the petition or complaint shows that the court appointing the administrator could not have had jurisdiction to do so. But in proceedings in the probate court, where the power of sale is given to the fiduciary himself, it seems to be different. Even the healing clause, soon to be mentioned in the laws of Michigan and Wisconsin, can do no good; for it aids only sales made "by an administrator," not by a person claiming to be an administrator, but who is not so in law.¹⁶⁴

Ohio might, since 1858, be classed with the states in which the judgment for selling land to pay the decedent's debts rests on the

¹⁶⁴ Compare *Thumb v. Gresham*, 2 Metc. (Ky.) 306, and *Hyatt v. James*, 8 Bush, 9 (chancery suits), with *Sitzman v. Pacquette*, 13 Wis. 291; *Frederick v. Pacquette*, 19 Wis. 541; *Chase v. Ross*, 36 Wis. 267; *Miller v. Miller*, 10 Tex. 319; *Washington v. McCaughan*, 34 Miss. 304; *Pryor v. Downey*, 50 Cal. 389; *Staples v. Connor*, 79 Cal. 14, 21 Pac. 380; *Long v. Burnett*, 13 Iowa, 28; *Sumner v. Parker*, 7 Mass. 79; *Withers v. Patterson*, 27 Tex. 491; *Ex parte Barker*, 2 Leigh (Va.) 719; *Allen v. Kellam*, 69 Ala. 442; *Downer v. Smith*, 24 Cal. 114 (no law for appointing an administrator). In some of these cases the administrator had been appointed, but had not qualified by oath and bond. See, contra, *Clapp v. Beardsley*, 1 Vt. 151, where local jurisdiction of appointing court was doubtful. The bearing of *Shipman v. Butterfield*, 47 Mich. 487, 11 N. W. 283, is not clear from the very short report. Compare effect of execution levied on lands under the South Carolina practice upon a revivor against an unlawfully appointed administrator (*durante absentia*) in *Griffith v. Frazier*, 8 Cranch, 9. In New York the appointment seems conclusive. *Abbott v. Curran*, 98 N. Y. 665. Where a competent court appoints an administrator c. t. a. the improper admission of the will does not render his license void. *Wight v. Wallbaum*, 39 Ill. 554. See, on same side, *Duffin v. Abbott*, 48 Ill. 18; *Shephard v. Rhodes*, 60 Ill. 301. The application does not abate by the administrator's removal, but may be continued after it. *Steele v. Steele*, 89 Ill. 51. Administrator appointed out of term, an emergency was presumed. *Schnell v. Chicago*, 38 Ill. 382. See for voidable, not void, appointments, *Edwards v. Halbert*, 64 Tex. 667; *Haynes v. Meeks*, 20 Cal. 310; *McCauley v. Harvey*, 49 Cal. 497. A defective administration bond is immaterial. *Bloom v. Burdick*, 1 Hill, 130. The whole doctrine is rejected in *Roach v. Martin's Lessee*, 1 Har. (Del.) 548.

same footing as any other judgment. The application may be made either to the probate court or common pleas court, of the county in which the letters issued, or in which the land to be sold, or any part of such land, lies. Thus, the proceeding cuts loose entirely from the settlement of the estate. It is a "civil action." Adverse claimants may be brought into court, and their titles litigated. Process, either actual or constructive, must be served as in other civil actions. Mortgagees as well as widow and heirs or devisees, and especially those who claim under deeds made to defraud creditors, are made parties; and a decree of sale is simply void as against one who purchased from the heir before suit brought, and who is not a party. The general guardian of minors may waive service of process for them. The court may, so as to prevent a sacrifice, order more land than just enough to pay the debts to be sold. The statute directs fuller relief against third parties in the common pleas than in the probate court; but the latter has jurisdiction to settle the title.¹⁶⁵

The Michigan statute is a fair example of many. It runs in substance as follows: (1) When the personal estate is insufficient to pay the decedent's debts, with charges, the administrator (or executor,—we shall use only the former word) may sell the real estate for the purpose on obtaining a license. (2) To obtain it, he must lay his petition before the probate judge who appointed him, showing the amount of personality, outstanding debts, description of lands, condition and value of each parcel, verified by oath. (3) If the proper facts are shown, the judge shall make an order "directing all persons interested in the estate to appear before him" at a time and place specified (between four and eight weeks) to "show cause why a license should not be granted," to sell "so much of the real estate as shall be necessary to pay such debts." (4) "A copy of

¹⁶⁵ Ohio, Rev. St. §§ 6136-6168; Wood v. Butler, 23 Ohio St. 520 (dismissal of petition against claimant of the land improperly joined, no bar); Allen v. Allen, 18 Ohio St. 234 (the family allowance a debt); Stone v. Strong, 42 Ohio St. 53 (priorities are settled, and sale is free of lien). Under the old practice mortgagee might be paid out of proceeds, and clear title given. Miller v. Greenham, 11 Ohio St. 486; Holloway v. Stewart, 19 Ohio St. 472 (now none but parties affected); Doan v. Biteley, 49 Ohio St. 588, 32 N. E. 600. See, as to old law, Newcomb v. Smith, 5 Ohio, 447 (no record entry, sale void); Richards v. Skiff, 8 Ohio St. 586 (recital that notice was proved, conclusive).

such order shall be personally served on all persons interested in the estate [fourteen days before hearing], or shall be published at least three successive weeks in such newspaper as the court shall order"; but all the parties in interest can, in writing, waive the notice. (5) At the appointed time or an adjournment "upon proof of due service or publication" or upon written consent the judge shall proceed to hear the matter. (6) And witnesses may be heard on both sides. So far it would appear: First, that service, either personal or by publication, is essential to a valid license, and therefore to a valid title thereunder; second, that the license can only be given to sell for payment of debts, but not for the payment of legacies, or for distribution. But the statute proceeds: (7) If the sale of a part would satisfy the debts, but thereby the rest of the lands, or some tract, would be injured, the court may direct the sale of a greater part or of all the land. (8) In such case the administrator must give bond to account for the surplus. (9) After hearing, the judge shall "make an order of sale, authorizing the administrator to sell the whole or such part" as he may deem proper. (10) The order shall specify the lands to be sold, and may direct in what order. (11) On the making of this order, and filing such bond as is required, a certified copy of the order of sale shall be delivered by the judge to the administrator, who may sell as directed, within one year, but not later. (12) The reversion of dower lands may be sold under such license. (13) The administrator must, before the sale, take and subscribe and file an oath that he will use his best endeavors to dispose of the estate in such a way as will be most for the advantage of all persons in interest.¹⁶⁶ Such is the outline of the

¹⁶⁶ Michigan, Ann. St. §§ 6025-6032, 6036-6039. Other sections bear on proceedings after license. Howard's edition in a note refers to the older acts from 1809 down. The present law was, in its main lines, enacted in 1857. A repeal of the old law after license granted (there being no saving in the repeal) made the sale thereunder void. *Campau v. Gillett*, 1 Mich. 416. When the administration is closed, the court cannot entertain a petition to sell. *Hoffman v. Beard*, 32 Mich. 218; nor after the debts are all barred by lapse of time since death. *In re Godfrey's Estate*, 4 Mich. 308. But where, by the provisions of a will, the estate is kept open beyond the usual time (4½ years), a license on petition filed thereafter is not void. *Church v. Holcomb*, 45 Mich. 25, 7 N. W. 167; *Larzelere v. Starkweather*, 38 Mich. 96. The healing clause (section 6076, as amended in 1860) is enforced in *Norman v. Olney*, 64 Mich.

law in many states. In Michigan and three other states, as shown hereafter, a healing clause has been added. A sale made by an administrator or guardian shall not be avoided by the heir, devisee, or ward, or those claiming under him, if it appears: (1) That the fiduciary was licensed by the probate court having jurisdiction; (2) that he gave the bond, which was approved by the judge; (3) that he took the prescribed oath; (4) that he gave notice of the time and place of sale; (5) that the premises were sold accordingly, the sale confirmed, and the premises are held by a purchaser in good faith. In short, if the proceedings after the license are fair, those preceding it cannot be inquired into. The license is valid, though given without any notice whatever. Under this clause, which took its present shape in 1869, sales have been sustained even where the court had not asked for a bond, and none was given, and where the value of lands sold far exceeded the debts. Another and much later act enables the probate judge to license a pledge of the decedent's lands for the purpose of raising money, upon proceedings similar in all respects to the above. The license must state the terms as to time and rate of interest; but there is no healing clause as there is for sales. License to mortgage can be granted on an application to sell.¹⁶⁷

The California statute differs in the following points: (1) The sale may be ordered for paying family allowance or legacies. (2) The petition must give the names of all heirs, devisees, etc., or set forth want of knowledge. (3) Defects in the petition may be supplied at the hearing, if recited in the decree. (4) Publication is to

553, 31 N. W. 555, where the petitioner proposed to divide out the surplus, and land much exceeding the debts in value was sold; and no bond given, none being required. The laws must be construed most favorably to purchaser. *Pratt v. Houghtaling*, 45 Mich. 457, 8 N. W. 72 (jurisdiction not lost by time, as long as estate not wound up); *Dexter v. Cranston*, 41 Mich. 448; and before the enactment of the healing clause, *Osman v. Trophagan*, 23 Mich. 80, 2 N. W. 674. But the court has no jurisdiction to sell a lesser estate than that of the decedent, i. e. it cannot sell subject to legacies or later mortgages. *Hewett v. Durant*, 78 Mich. 186, 44 N. W. 318.

¹⁶⁷ Michigan, §§ 6105-6107, enacted in 1861. Failure to name terms is fatal to mortgage. *Edwards v. Taliafero*, 34 Mich. 15. Nor is any equity worked out for the mortgagee. *Detroit F. & M. Ins. Co. v. Aspinall*, 45 Mich. 330, 7 N. W. 907; *Cahill v. Bassett*, 66 Mich. 407, 33 N. W. 722.

be made for four weeks. (5) The decree must state the terms of sale, and whether it is to be public or private. (6) The administrator may be compelled to execute the decree. Any party in interest may apply for it. This really turns the whole proceeding into an administration bill. There is no provision for oath or bond,¹⁶⁸ and there is no healing clause.¹⁶⁹

The New York statute requires in the administrator's petition a very full and detailed statement of the debts and expenses, with names of creditors and claimants, description of lands and landed interests, with value of each, and name of occupants, and what assets have come to hand; or it must set forth that these facts cannot be ascertained. The surrogate may issue his citation to all heirs or devisees that he knows of, and notify all other creditors. Decree is to be made only to pay debts not secured by lien, or through power of sale in trust. A mortgage or lease of the lands may be decreed. Descended lands are to be sold before devised; those still held before those already sold by the heir or devisee. The administrator is to give bond, but no oath is prescribed. If he refuses to carry out the decree, a "disinterested freeholder" may be appointed to do so. There is no healing clause, and the jurisdiction of the surrogate depends not only upon the citation being brought home to the heirs, etc., in person or by publication, but also on the petition containing facts giving such jurisdiction to order the sale of lands. A creditor may apply within three years from death, not counting time of litigation between him and the executor to establish the claim.¹⁷⁰

¹⁶⁸ California, Code Civ. Proc. § 1536 et seq.; under section 1565 executory contracts for land may be thus sold by the administrator.

¹⁶⁹ Hence, order made without notice is a nullity. *Abila v. Burnett*, 33 Cal. 658, 666. And where the administrator is guardian for infant, a special guardian must be appointed to defend. *Townsend v. Tallant*, 33 Cal. 46, 52. But on a collateral attack the recital in the decree proves that the defects of the petition were supplied. *Dennis v. Winters*, 63 Cal. 16. But the facts must appear somewhere. *Pryor v. Downey*, 50 Cal. 388.

¹⁷⁰ New York, Code Proc. §§ 2752-2766. The proceeding is in personam, rests on jurisdiction over the person. *Schneider v. McFarland*, 2 N. Y. 461. The court declares that *Grignon's Lessee v. Astor*, 2 How. 338, decided by the supreme court, and growing out of the Michigan territorial law, and *McPherson v. Cunliff*, 11 Serg. & R. (Pa.) 429, are not applicable under the New

The Pennsylvania law, on the contrary, is much simpler. Like that of New York, it authorizes either sale or mortgage. The orphans' court alone has jurisdiction. The law now in force dates back in the main to 1832 and 1834. In one chapter it treats of applications by the administrator to sell for debts and support and education of children, or debts alone, of applications by guardians to sell their wards' lands, and of life tenants or remainder-men to sell entailed lands. Notice must be served on persons living in the same county, as in ordinary actions. The notice for a minor is given to his guardian. If he has none, then to one over 14 years in person, and to the next of kin of a child under 14. When they live elsewhere, the orphans' court decides whether such notice is practicable, and may order publication in lieu thereof.¹⁷¹ It seems the doctrine held before the present statutes, by which the proceeding was considered in rem, the administrator representing all parties, is no longer tenable.¹⁷² The license may be given to one of several administrators.¹⁷³

York statute, then substantially like the present. As to time for application see *In re Bingham*, 127 N. Y. 296, 27 N. E. 1055. *Sibley v. Waffle*, 16 N. Y. 180, holds the decree null, if the publication is not fully made as required. Its recital in the decree is unavailing. Four successive publications, one a week, were enough before the Code of Procedure. *Sheldon v. Wright*, 5 N. Y. 497. In the leading case of *Bloom v. Burdick* (*supra*, note 164) arising under a license granted in 1820, the following points were decided: (1) Decree against infant without notice or appearance is void; (2) inventory filed takes the place of the account of personality required by statute; (3) if not filed before the show cause order, there would be no jurisdiction; (4) it is presumed that the personal property was applied before ordering the sale of the land; (5) referring to the lot at a given point as that of the decedent may be a sufficient description; (6) long acquiescence strengthens the presumption of regularity. The surrogate's office was then an "inferior court;" but this was said to be of little importance in the case.

¹⁷¹ *Pennsylvania*, Dig. "Decedents' Estates," 121 et seq.; "Orphans' Court," 27, 28.

¹⁷² *McPherson v. Cunliff*, 11 Serg. & R. 422, where the true heirs were unknown, and had never been made parties, and the supposed lawful son bought up their title, and brought ejectment against the purchaser,—a most unmeritorious case. The court held the proceedings for license to be in rem; hence, naming or summoning the true parties quite immaterial.

¹⁷³ *Bickle v. Young*, 3 Serg. & R. 234. There is somewhat more strictness about mortgages than about sales. *Appeal of Hilton*. 116 Pa. St. 351, 9 Atl. 342; *Spencer v. Jennings*, 114 Pa. St. 618, 8 Atl. 2; again, 123 Pa. St. 184, 16 Atl. 426.

In Delaware the application, when the "personalty is not sufficient to pay the debts," is made by petition to the orphans' court of the county, in which any land of the decedent lies. Notice in writing is given 10 days beforehand to the parties in interest, and to the guardians of minors who reside in the state, and to the tenants in possession of the lands to be sold. If any party in interest or guardian does not reside in the state, the court directs how publication is to be made. A creditor may have an order on the administrator to petition. The court, upon hearing, directs the administrator to sell; and with the consent of the widow the land may be sold free of dower, she taking the value of the thirds for life in money. No cases on the validity of sales so made seem to be reported.¹⁷⁴

The Wisconsin statute has grown out of that for Michigan. It very properly speaks throughout of the "county court," not of the judge. It treats of mortgages along with sales. It has a healing clause like that of Michigan, but it seems that the fiduciary must in all cases have given "a bond" before a purchaser can shelter under this clause.¹⁷⁵

The Iowa statute, though it regulates the proceedings on the petition otherwise than an ordinary lawsuit, simplifies the matter much by directing that the "notice" shall be served on the heirs and devisees just as a notice would be served in any other case; that is, personally on those within the state, by publication on those who are absent or concealed. The courts have recognized the proceeding as being "adversary," not in rem; that is, binding only on those who are made parties and notified.¹⁷⁶ But this has not been very

¹⁷⁴ Laws Del. c. 90.

¹⁷⁵ Ann. Wis. St. §§ 3874-3890; section 3900 brings in executory contracts. The court is to appoint a guardian for a minor who has none, and for unknown persons (section 3878); section 3919 (the healing clause, dating back to 1849). As to what county court has jurisdiction, see *Mohr v. Porter*, 51 Wis. 487, 8 N. W. 364; *Melms v. Pfister*, 59 Wis. 186, 18 N. W. 255. Defects in the petition are cured. *Reynolds v. Schmidt*, 20 Wis. 394. Or lack of verification. *Melms v. Pfister*, *supra*.

¹⁷⁶ Iowa, St. §§ 2386-2407 (note, section 2389); *Good v. Norley*, 28 Iowa, 188 (under Code of 1851, which allowed the court in each case to prescribe form of notice and mode of serving; but there was none). It is said that answer by guardian ad litem for an unnotified infant is unavailing. *Allen v. Saylor*,

closely adhered to, and defective service has been deemed good enough on collateral attack.¹⁷⁷ The petition is filed in the county court, but all presumptions of regularity must prevail. The court may order more to be sold than is necessary for payment of debts in order to prevent a sacrifice. If the widow is made a party, and does not defend, she may lose her dower lands; for the powers of the court are general, and bind all parties.¹⁷⁸

The Minnesota law is taken almost literally from that of Michigan, including the healing clause; but it allows a license to sell for the purpose of paying legacies, and says nothing about leave to mortgage lands. A private sale may be ordered; that is, a sale on written bids. It was decided here that the "probate court having jurisdiction," spoken of in the healing clause, means simply the court which has appointed the guardian or administrator, not the court which has acquired jurisdiction over the person by service of process, as the clause would otherwise be useless. A license to sell the decedent's undivided share in a larger tract may, after partition, be carried out on the allotted share in severalty.¹⁷⁹ The Dakota statute is taken

14 Iowa, 437. The land was said not to be "sold by executor," and the short limitation for recovering such land was not applied. *Bacon v. Chase*, 83 Iowa, 521, 50 N. W. 23 (a case of stale pursuit). The deed alone, without the preceding record, does not uphold the purchaser's title. *Thornton v. Mulquinne*, 12 Iowa, 549.

¹⁷⁷ *Spurgin v. Bowers*, 82 Iowa, 187, 47 N. W. 1029 (where the assignee of the heir to one-eighth had not been notified); *Morrow v. Weed*, 4 Iowa, 77; *Myers v. Davis*, 47 Iowa, 325 (copy for infant not delivered to father). And where guardian is notified on behalf of infant under 14 the judgment is valid, though he does not answer. *Bickel v. Erskine*, 43 Iowa, 213.

¹⁷⁸ *Garyn v. Hatcher*, 39 Iowa, 685; *Olmstead v. Blair*, 45 Iowa, 42 (sale of large tract); *Cowins v. Tool*, 36 Iowa, 82.

¹⁷⁹ Minnesota, St. c. 57, which embraces also licenses to guardians, etc.; the healing section (51), which was slightly enlarged in 1881, passed upon in *Spencer v. Sheehan*, 19 Minn. 338 (Gil. 292), following *Montour v. Purdy*, 11 Minn. 384 (Gil. 278), where the proceeding is said to be in rem. Under the law in force in and before 1860 a bond had to be required in each case. *Babcock v. Cobb*, 11 Minn. 347 (Gil. 247). But not now. Its absence was proved by the silence of the record. *Id.* The probate court has no power to set aside the sale after it is confirmed. *State v. Probate Court*, 19 Minn. 118 (Gil. 85). It is said in *Montour v. Purdy*, supra, that the five exceptions in the healing clause cut off all questions of policy, and as to the character of court or proceedings. The exceptions in the healing clause have been held to lower somewhat the presump-

from that of Minnesota. The decisions made in the latter state are subjoined as applicable, but there is no healing clause, such as in Michigan.¹⁸⁰

In Nebraska, the Michigan statute, including the healing clause, has been copied almost literally in all its parts; but the law is so written, or at least so construed, that in all cases a bond must be required from the administrator before he is allowed to proceed to a sale. The application, however, is made in the district court of the county in which the letters were granted, no matter where the land lies.¹⁸¹ In Kansas, the administrator, as soon as he finds that the personality is insufficient to pay the debts, applies, by petition, to the probate court that issued the letters, for leave to sell any lands within the state, including any that may have been conveyed with intent to defraud creditors. The petition sets forth the amount of debts and charges and a description of the land to be sold. Notice of hearing is given in such manner and for such length of time as the court directs. The court, when such sale is necessary, empowers the administrator to make it for cash or on a credit of not more than two years, and may require an additional bond. The usual power is given to order the sale of more, to avoid loss. The title to the land proposed to be sold cannot be tried by the probate court, nor by the district court on appeal. A failure to describe in the petition the land to be sold does not render the decree and sale thereunder void. A newspaper publication, if such is ordered, may lead to a valid decree, though the heirs be residents. Yet the proceeding is adversary, not in rem, and notice is indispensable. Where the form of notice is directed by the court, and the notice actually given is not

tion in favor of the court's action. *Davis v. Hudson*, 29 Minn. 28, 11 N. W. 136. As to private sale, see *Humphrey v. Buisson*, 19 Minn. 221 (Gil. 182); *Rice v. Dickerman*, 47 Minn. 527, 50 N. W. 698; *Culver v. Hardenbergh*, 37 Minn. 225, 33 N. W. 792. Chapter 9 of the probate act of 1889 has recast the forms of proceeding, leaving them substantially as stated in the text from the Revision of 1878.

¹⁸⁰ Dakota Territory, Code, §§ 171-192 (including directions as to sale). *Pratt v. Houghtaling*, 45 Mich. 457, 8 N. W. 72; *Oberstein v. Oswalt* (Mich.) 10 N. W. 360; *Rumrill v. First Nat. Bank*, 28 Minn. 202, 9 N. W. 731.

¹⁸¹ Nebraska, Consol. St. §§ 1136-1181. Want of a guardian ad litem does not avoid the license. *McClay v. Foxworthy*, 18 Neb. 299, 25 N. W. 86. Long lease may be sold by administrator without license. *Mulloy v. Kyle*, 26 Neb. 316, 41 N. W. 1117; *Stack v. Royce*, 34 Neb. 833, 52 N. W. 675.

found, it is presumed that it agreed with the order. The court has no power to order money to be raised by mortgage on the land.¹⁸²

An unsatisfactory practice prevails in Mississippi. Though the administrator's petition is filed in the chancery court, yet the proceeding is not a suit in equity. Only the decedent's title is sold. If those who are notified as heirs or devisees set up title in themselves, not derived from the decedent, they are repelled with the solace that a decree of sale will not harm them. In short, the court cannot give a good title to the purchaser. A decree rendered without notice to the parties in interest is void. So it is when there is no petition setting forth the object of the sale, or when the order of sale does not agree with the object set forth in the petition.¹⁸³

In Alabama, the application is made to the probate court. This court has no general equity powers. Hence, if it orders a sale contrary to the decedent's will, in disobedience to the statute, or where the application does not set forth the facts giving jurisdiction (debts and deficiency of personality) the sale is void; but the lack of notice is immaterial, the proceeding being considered as altogether in rem.¹⁸⁴ But where the proceeds of sale have been used to discharge

¹⁸² Kansas, Gen. St. §§ 2898-2906; *Cooper v. Armstrong*, 3 Kan. 78; *Bryan v. Bauder*, 23 Kan. 95; *Fudge v. Fudge*, 23 Kan. 416; *Mickel v. Hicks*, 19 Kan. 578; *Johnson v. Clark*, 18 Kan. 157; *Taylor v. Hosick*, 13 Kan. 518; as to last point, *Black v. Dressell*, 20 Kan. 153.

¹⁸³ Mississippi, §§ 1893, 1894-1902; *Gill v. Shirley*, 55 Miss. 814. A reversion may be sold. *Williams v. Ratcliff*, 42 Miss. 145; *Campbell v. Brown*, 6 How. (Miss.) 106; *Williams v. Childress*, 25 Miss. 78 (both under the former law which threw these petitions into the probate court; no notice). But a failure to file account of personality not fatal. *Eldridge v. McMackin*, 37 Miss. 72.

¹⁸⁴ Alabama, Code, §§ 2103-2115; *Mosely v. Tuthill*, 45 Ala. 621. The probate court cannot confer a license when a power of sale is given by the will. *Wilson v. Holt*, 83 Ala. 528, 3 South. 321. And see *Alabama Conference v. Price*, 42 Ala. 39; *Robertson v. Bradford*, 70 Ala. 385; *Tyson v. Brown*, 64 Ala. 244 (neither application nor decree clear as to purpose of sale). The probate court cannot adjudge a sale against any "unknown" heirs, as the provision for reaching these is confined to chancery suits. *Bingham v. Jones*, 84 Ala. 202, 4 South. 409; *King v. Kent*, 29 Ala. 542 (in rem). The ninety-ninth number of the Alabama Session Acts of 1887 provides for a publication during three weeks, whenever the widow or the next of kin does not reside within the county.

liens upon the land, or otherwise for the benefit of the heirs, equity will enjoin them from enforcing their legal rights, unless they make restitution; and this upon general principles, which ought to apply as well in other states, and not by reason of any thing to that effect in the Alabama statute.¹⁸⁵

The New England statutes are very simple. In Rhode Island, as elsewhere, the probate judge, not the equity judge, has jurisdiction. It is his duty to notify all parties in interest in one of three ways, among which he may choose,—either personal citation, served like a summons, or posting at three public places for 14 days, or by a newspaper publication “for fourteen days, once a week.” From decisions under other clauses of the section which prescribes such notice, it seems that the failure to give it might annul the proceeding. Evidently the statute refers to the probate judge from whom the administrator holds his appointment. There are no other details as to the mode of proceeding, or the form of licensing order.¹⁸⁶ The Connecticut statute is very short. The probate court in which a decedent’s estate is “in settlement,” upon the application (no written petition is mentioned) of the administrator or executor, upon hearing after public notice (i. e. a posted bill or advertisement), may, in its discretion, order the sale of the whole or any part of the real estate, taking a sufficient probate bond. There is little room for a fatal mistake, unless it be in the administrator’s right to his office, or local jurisdiction of the court.¹⁸⁷ In Vermont, the license may be granted as well for the supposed benefit of the heirs and devisees as for the payment of debts, if the heirs and devisees residing in the state consent in writing, the consent of minors being given through their guardians; but, when there is no such written consent, the administrator must apply to the probate court, which orders the parties in interest to be notified. Under the license to sell, the administrator cannot incumber the land, nor can he grant a passway or easement on the unsold

¹⁸⁵ Robertson v. Bradford, 73 Ala. 116 (same parties as above). Compare, however, Detroit F. & M. Ins. Co. v. Aspinall, *supra*, note 167.

¹⁸⁶ Rhode Island, St. c. 179, §§ 10, 12–20; Draper v. Barnes, 12 R. I. 156; Thurston v. Thurston, 6 R. I. 296. As to notice, see chapter 180, § 2, cl. 9, and section 4; Smith v. Burlingame, 4 Mason, 121, Fed. Cas. No. 13,017.

¹⁸⁷ Connecticut, Gen. St. §§ 600, 601. No cases of collateral attack are reported from either Rhode Island or Connecticut.

part.¹⁸⁸ The statutes of Maine and Massachusetts make it the administrator's duty to apply to the probate judge for a license to sell, to lease, or to exchange so much of the decedent's land (including undivided shares and other interests) as may be necessary to pay debts, legacies, and expenses, and more, if a sale for just enough would cause injury; and, with the widow's consent, to sell her dower land, too. Nothing is said about notice, but it seems to be usually given; and the parties in interest may appeal from the grant of license to the supreme court. The administrator must take a prescribed oath before he gives notice of the sale, and must also execute bond. In Massachusetts he may sell any land which creditors could reach, though fraudulently held or claimed by others, and the purchaser must fight it out with the holder or claimant. No title passes unless the oath is taken.¹⁸⁹ All debts being barred in two years from the grant of letters, an application made after that time is bad on its face, and the license issued thereon void.¹⁹⁰ In New Hampshire, the present statute does not require, though an older one did, notice to the parties in interest. The reversion on the dower land may be included; more land than enough may be sold, to prevent sacrifice; and with the consent of the surviving husband or wife, and of the guardian's of minor children even the whole of the decedent's land. Lands fraudulently conveyed may be sold; the purchaser here also having to recover the land as best he can. License to sell for payment of debts must be applied for within two years. It is thus seen that the probate judge is in the New England states hardly more than adviser to the administrator, whose advice can, however, be overruled by the supreme court. The application for license has but little resemblance to an adversary suit.¹⁹¹

¹⁸⁸ Vermont, St. § 2169 et seq.; *Brown v. Van Duzee*, 41 Vt. 529. Aside of the character of the administrator (see note 164), no question of validity seems to have arisen.

¹⁸⁹ Maine, c. 71, §§ 1-4; Massachusetts, Pub. St. c. 134, slightly amended in 1885; *Nowell v. Nowell*, 8 Me. 222 (appeal); *Campbell v. Knights*, 26 Me. 224 (no title unless oaths taken); *Hannum v. Day*, 105 Mass. 33 (license to one out of several administrators is void). Form of oath deemed sufficient in *Fowle v. Coe*, 63 Me. 245.

¹⁹⁰ *Franklin Sav. Inst. v. Reed*, 125 Mass. 365; *Lamson v. Schutt*, 4 Allen, 359.

¹⁹¹ New Hampshire, c. 194, §§ 1-12; *French v. Hoyt*, 6 N. H. 370 (notice
(1127)

In Missouri, the application for license is made to the probate court (which is entitled to all presumptions as much as a superior court) when the personality is insufficient to pay debts and legacies. A petition and exhibits are filed, and, if on these papers a sale is deemed proper, a publication for four weeks is ordered or hand bills are posted in 10 places in the county. There seems to be no provision for personal notice. After proof and hearing, the order of sale is made. The creditors may apply, if the administrator does not. The insufficiency of the petition does not, on collateral attack, avoid the license. The order may describe the lands by reference to the petition. The court can order the sale of equities of redemption or other partial interests; but the license can only be to sell for money, not to turn over a tract of land by way of compromise for a claim against the estate.¹⁹² The great difficulty in this state is the line of jurisdiction. A court of equity has none to sell for ordinary debts of decedent, while the probate court has none to subject the separate estate of a married woman to her engagements, which bind it in equity.¹⁹³

In Arkansas, lands are said to be assets in the hands of the administrator. He can sell them only by license, for which he applies to the court in which he has qualified. The order authorizing the sale is unassailable, even if no notice was given (as required) to the heirs, devisees, or terre-tenants.¹⁹⁴

essential under law of 1822). Ordered now at times, *Flanders v. George*, 55 N. H. 486. When more than is ordered is sold, last sale void. *Adams v. Morrison*, 4 N. H. 166; *Badger v. Story*, 16 N. H. 168; *Gordon v. Gordon*, 55 N. H. 399 (fraudulently conveyed lands).

¹⁹² Missouri, St. §§ 145–152; *Day v. Graham*, 97 Mo. 398, 11 S. W. 55 (mortgage debts are good basis for selling); *Camden v. Plain*, 91 Mo. 117, 4 S. W. 86; *Jackson v. Magruder*, 51 Mo. 55; *Bompart's Adm'r v. Lucas*, 21 Mo. 598; *Price v. Springfield Real-Estate Ass'n*, 101 Mo. 107, 14 S. W. 57.

¹⁹³ *Priest v. Spier*, 96 Mo. 111, 9 S. W. 12. *Contra*, *Davis v. Smith*, 75 Mo. 219, and *Boston v. Murray*, 94 Mo. 175, 7 S. W. 273. *Presbyterian Church v. McElhinny*, 61 Mo. 540 (probate court cannot sell for widow's debts, though directed by will to be paid).

¹⁹⁴ *Gordan v. Howell*, 35 Ark. 381 (in county of qualification); *Mock v. Pleasants*, 34 Ark. 63 (no jurisdiction in equity court, except on special grounds); *Bell v. Green*, 38 Ark. 78 (judgment conclusive). *Mays v. Rogers*, 37 Ark. 155 (lien gone by delay of 10 years), is not a case of collateral attack. *Montgomery v. Johnson*, 31 Ark. 74, applies to lien debts.

In Illinois, until 1887, when the proceedings for license to sell for the payment of debts and charges were turned into a suit in chancery, notice was given before the term at which the petition was filed. This petition had to be, and must still be, preceded by an account of the personality and debts. Any creditor might start the application, if the administrator did not. The county and circuit courts formerly had concurrent jurisdiction. The proceedings were said to be at law. Adverse claimants could not be brought in to clear the title (now they can). Where the original papers were lost, the recital of notice or publication in the order or in the petition and exhibits would supply their place. The failure to preserve the papers could not destroy the purchaser's title.¹⁹⁵

In Colorado, the proceedings for license to sell or to mortgage land for payment of debts are carried on very nearly like ordinary suits. All the heirs and devisees (and the guardians of those who are minors) are made parties. Process, actual or constructive, is served as in other cases; but, as in Alabama and formerly in Illinois, no title hostile to that of the decedent can be either set up or attacked and set aside. Thus, the court cannot give to the purchaser more than such estate as the decedent had, freed from incumbrances, by paying the lien creditors out of the proceeds.¹⁹⁶

In Florida, the administrator may apply to the "circuit court or to the county judge" (the latter having general jurisdiction in probate matters, but limited when dealing with land) by showing the insufficiency of assets; and the present law makes no provision for notifying any body. The heirs or devisees may, however, at any time be-

¹⁹⁵ Shoemate v. Lockridge, 53 Ill. 503 (license, law not equity: erroneous decree of correction not void); Moffit v. Moffit, 69 Ill. 641, and Bowen v. Bond, 80 Ill. 351 (lost papers); no license needed for selling leasehold, Thornton v. Mehring, 117 Ill. 55, 25 N. E. 958. See Cutter v. Thompson, 51 Ill. 390; Clark v. Hogle, 52 Ill. 427; Swearengen v. Gulick, 67 Ill. 208 (heirs need not be made parties),—all as to proceedings under former law. The position in Unknown Heirs of Langworthy v. Baker, 23 Ill. 488, as to voidness of proceedings when application is not made at next term after notice, is limited in Schnell v. Chicago, 38 Ill. 382, to direct attack.

¹⁹⁶ Colorado, St. §§ 3577-3590; Nichols v. Lee, 16 Colo. 147, 26 Pac. 157 (grantee of heir not necessary party); Sloan v. Strickler, 12 Colo. 179, 20 Pac. 611 (as to summons).

fore sale, be heard as regards the order in which the sale shall take place.¹⁹⁷

Indiana has had much litigation over sales by license. For some years there has been only one court in Indiana,—the circuit court. Thus, the license has all the presumptions due to a superior court. Any estate, legal or equitable (except those held by executory contract), land certificates under the United States or for school lands, and land fraudulently conveyed by the decedent may be sold for debt. The petition makes the heirs and devisees, and all pretended lienholders, who are sought to be barred of their claims, and fraudulent grantees, defendants. But the widow cannot be barred of her rights. Since 1883 the only notice of hearing is a publication for three weeks in a weekly paper published in the county. Formerly, actual notice had to be served on all defendants residing in the county, and want of such notice made the order of sale void. Adult defendants may waive notice. Since August, 1855, there is a healing clause, borrowed from the Michigan statute; but it omits the taking of an oath among the essentials (indeed, no oath is prescribed). The fiduciary must not only have given bond, but must have accounted for the proceeds of sale. Legal notice of the sale must have been given, but it need not have been confirmed.¹⁹⁸ The sale may be ordered free of liens,—that is, the lienholders are to be

¹⁹⁷ Florida, Rev. St. § 1921; compare section 1920 as to sale for division among heirs and devisees. *Wilson v. Fridenberg*, 21 Fla. 386 (unauthorized mortgage gives no right to subrogation); *Sloan v. Sloan*, 25 Fla. 53, 5 South. 603 (record must show grounds of jurisdiction); *Deans v. Wilcoxen*, 18 Fla. 531; *Id.*, 25 Fla. 980, 7 South. 163 (notwithstanding use of word "solvent" in older statute, probate court has like power over insolvent estate).

¹⁹⁸ Indiana, Rev. St. §§ 2332–2369, which include all kindred proceedings. See, as to effect of an unlicensed sale, *Duncan v. Gainey*, 108 Ind. 584, 9 N. E. 470. The jurisdiction of the court granting the letters extends to land throughout the state. *Vail v. Rinehart*, 105 Ind. 13, 4 N. E. 218. The widow's share not being subject to debts, the order to sell it is pro tanto void. *Hutchinson v. Lemcke*, 107 Ind. 127, 8 N. E. 71; *Compton v. Pruitt*, 88 Ind. 178; *Armstrong v. Cavitt*, 78 Ind. 476. Land fraudulently bought by the decedent under the name of another is subject. *Bushnell v. Bushnell*, 88 Ind. 404. The judgment estops the heirs from claiming the land by independent title. *Lantz v. Maffett*, 102 Ind. 25, 26 N. E. 195. The failure to give bond does not avoid a sale when the proceeds have been truly accounted for. *Foster v. Birch*, 14 Ind. 445. See, under old law requiring notice, *Helms*

paid out of the proceeds,—or subject to liens, the purchaser giving bond to discharge them.¹⁹⁹

The Washington statute follows that of California pretty closely. The notice may be served personally, or may be published for four weeks. If personal, it must be served on the general guardians of the minors interested in the land; and, when there is no guardian, the court must appoint one to protect the interest of the minors. Time has hardly elapsed for testing the validity of sales. "Community property," when liable for the debts, can be sold by license.²⁰⁰

In Oregon, the law is framed very nearly upon that of Minnesota, including the healing clause; and to this, as will be shown in the next section, which treats of the sale of infants' lands, a wider extension is given than in the states which originally contrived it.²⁰¹

The statutes of New Jersey do not exclude, but indeed acknowledge, the jurisdiction of the chancery court in the settlement of decedents' estates, and in the sale of land for the decedents' debts; but an application by the administrator to the orphans' court for license to sell is given as the ordinary remedy. Lands are liable for one year after the debtor's death; and only during this period can the orphans' court of the last domicile grant a license. The widow's dower is excluded from the sale. Where land is in any other county, the application must be made to the orphans' court of that county. Notice of the hearing is given either by posters in three public places or newspaper publication for six weeks. The court must not order more land to be sold than is necessary to pay the debts and expenses, and should designate what is to be sold. But an order "to sell all the land, or as much thereof as will be sufficient," though irregular, is not void. The orphans' court has power to examine the title, so as not to sell any greater interest than the decedent owned, but it cannot bar adverse claimants.²⁰²

v. Love, 41 Ind. 210, and several cases in the sections on "Actual Notice" and on "Appearance."

¹⁹⁹ Id. § 2350; Moody v. Shaw, 85 Ind. 89. If the order does not expressly say "free of lien," the purchaser buys subject. Massey v. Gerauld, 101 Ind. 273; Boaz v. McChesney, 53 Ind. 193.

²⁰⁰ Washington, Code Proc. §§ 1005–1014. See Ryan v. Fergusson, 3 Wash. St. 356, 28 Pac. 910, as to mortgaged land and community property.

²⁰¹ See note 235 to next section.

²⁰² New Jersey, Revision, "Orphans' Court," 70–73, amended as to publica-

While in South Carolina the Revised Statutes and Code of Procedure direct that the probate judge shall carry on sales from his own court, they are silent as to sale for the decedent's debts, the very one which would most frequently occur. In the only reported case in which a question was raised on the validity of such a sale, the court refused to pass on the jurisdiction of the probate court over creditor's bills, as the order against the infants was void for want of service, and of a defense by *guardian ad litem*.²⁰³

While in Texas, before 1848, the statute on administrators' sales was somewhat strict, and allowed the "requisition to sell" to be granted only at the instance of a creditor, it has ever since that year been very broad, and the construction still broader. It amounts simply to this: that the purchaser need not look beyond the order of sale granted by competent authority, namely the county court appointing the administrator. The averments to be made in the application, the description which it ought to contain of the land to be sold, in fact the filing of any petition, are said to be "directory" only; and an order to sell enough of the decedent's land to pay his debts seems to support a valid sale.²⁰⁴ Little need be said about the youngest states, such as Idaho, Montana, and Wyoming and the territories, where there has hardly been time enough for testing under collateral attack such sales as have been made by administrators or guardians. The statutes in the two former states follow that of Minnesota pretty closely, without its healing clause, that of Wyoming in the main that of Missouri.

Returning to Georgia we find a very simple procedure before the ordinary who granted the letters. The notice is now to be given

tion in 1788; *Runyon v. Newark India Rubber Co.*, 24 N. J. Law, 467; *Pittenger v. Pittenger*, 3 N. J. Eq. 156; *Palmer v. Casperson*, 17 N. J. Eq. 204; *Robison v. Furman*, 47 N. J. Eq. 307, 20 Atl. 898 (time of publication; passing on title); *Bray v. Neill*, 21 N. J. Eq. 343; *Swackhamer v. Kline's Adm'r*, 25 N. J. Eq. 503.

²⁰³ *Rev. St. S. C.* § 1931; *Code Civ. Proc.* § 307; *Finley v. Robertson*, 17 S. C. 435. An order to sell part of descended land does not exhaust the powers of the probate court. *Hodge v. Fabian*, 31 S. C. 212, 9 S. E. 820.

²⁰⁴ *Texas, Rev. St. art. 2660*; *Weems v. Masterson*, 80 Tex. 45, 15 S. W. 590; *Alexander v. Maverick*, 18 Tex. 196; *Davis v. Touchstone*, 45 Tex. 490; *Kleinecke v. Woodward*, 42 Tex. 311; *Wells v. Polk*, 36 Tex. 120. Contra, under old law, *Miller v. Miller*, 10 Tex. 319.

in all cases by publication for four weeks; and when, under a former shape of the statute, residents were to be notified in person, it was held that notice improperly given was not the same as no notice, and a license given on publication against resident heirs was held valid on collateral attack. A description in petition and order of sale, amounting to no more than so many acres of N. (the decedent) in such a county was held sufficient. The administrator cannot ask for the sale of lands in adverse possession; he should first recover the lands. But the possession of the heir is not adverse. Contingent remainders may be sold under the act. Lienholders and mortgagees, though not made parties in form, are so far bound by the sale that their rights are transferred from the land to the proceeds. No state departs further from the principles of the common law as to the sacredness of land titles.²⁰⁵

§ 151. To Sell Infants' Land.

We come now to the judgments of courts for selling the land of infants, not at the instance of the creditor, or of a fiduciary who in some way represents the creditors, but for the benefit, or supposed benefit, of the infant himself; that is for one of the following purposes: To forestall the creditor's action, and raise the means for paying off taxes, liens, and debts; to raise money for the nurture and education of the infant, or of the infant's family; to invest the proceeds of the land sold in a more beneficial way. The common law, including therein equity and ecclesiastical law, knew nothing of meddling with the infant's freehold for any such purposes. It was done in England, if at all, by private act of parliament, and in the New England states in colonial times by the "general court," which combined the judicial with the law-making powers. In those states the authority to license sales by the guardian was at an early day conferred on the probate judges.²⁰⁶

²⁰⁵ Georgia Code, § 2549 (also §§ 2486, 2564); *Stell v. Glass*, 1 Kelly, 486; *Clements v. Henderson*, 4 Ga. 148 (decided when the ordinary's was a "limited court"); *Davis v. Howard*, 56 Ga. 430; *McGowan v. Lufburrow*, 82 Ga. 523, 9 S. E. 427; *Davie v. McDaniel*, 47 Ga. 195; *Patterson v. Lemon*, 50 Ga. 231 (no special order in other county); *Stallings v. Ivey*, 49 Ga. 274; *Newsom v. Carlton*, 59 Ga. 516.

²⁰⁶ Lord Hardwicke in *Taylor v. Philips*, 2 Ves. Sr. 23, disclaimed for the
(1133)

The proceeding of the guardian to obtain leave to sell, or to obtain a decree for a sale by the commissioner of the court, is in its nature not adversary, but amicable; yet, in several of the states, it takes an adversary character. The defendant is summoned and has a guardian ad litem assigned. Yet, in the states where it takes such a character, there are other requirements for a valid judgment, than the mere service of notice, as will be seen in Virginia and Kentucky. In some states a "friend" (*prochein ami*) of the child, or its father, as guardian by nature, may apply for the order of sale. Where the statute says that the guardian must apply, the license or judgment of sale must fall to the ground, if the applicant was not the lawfully appointed guardian.²⁰⁷

An equitable interest may be conveyed or devised to infants in such a manner that a court of equity can, under its inherent powers over trusts, order a sale. The courts differ on the question whether, in such cases, all the forms of the statutes must be observed or not. Kentucky says yea, Virginia nay.²⁰⁸

In the New England states the license of the guardian is most chancery the power to "bind the inheritance of an infant." To wield such power would be an encroachment upon the province of the legislature. To like effect, *Faulkner v. Davis*, 18 Grat. 651; *Forman v. Marsh*, 11 N. Y. 547. See, contra, dictum in *Morris v. Morris*, 15 N. J. Eq. 239, and assertions in *Hurt v. Long*, 90 Tenn. 445, 16 S. W. 968, that chancery has inherent power to ratify the sale of infant's land, the guardian having sold in the mistaken belief that he had a testamentary power.

²⁰⁷ *Graham v. Houghtalin*, 30 N. J. Law, 552 (an infant not orphaned is not a subject in New Jersey of the orphans' court). See, contra, under an old law, *Vowles v. Buckman*, 6 Dana, 466 (natural guardian incapable); *Shanks v. Seamonds*, 24 Iowa, 131; *McKee v. Hann*, 9 Dana, 533. In *Williamson v. Warren*, 55 Miss. 199, appointment without giving any bond was held void, the appointee no guardian, license and sale a nullity. Informality in appointment not fatal. *Burroughs v. De Couts*, 70 Cal. 373, 11 Pac. 734. And so as to guardian appointed by clerk in vacation, confirmed by court afterwards. *Shumard v. Phillips*, 53 Ark. 37, 13 Pac. 510. The cases of *Palmer v. Oakley*, 2 Doug. (Mich.) 433, and *Perry v. Brainard*, 11 Ohio, 442, where sales by guardian were held for naught, because he had not been appointed with the consent of the ward, who was old enough to choose, may be considered as no longer the law. In Oregon, on the precedent of *Davis v. Hudson*, 29 Minn. 27, 11 N. W. 136, the healing clause forbids inquiry into the character of the guardian. *Walker v. Goldsmith*, 14 Or. 125, 12 Pac. 537.

²⁰⁸ *Barrett v. Churchill*, 18 B. Mon. 387.

easily obtained. In Massachusetts he may have leave to sell in order to discharge the ward's debts (and more than enough to prevent sacrifice), or if the income is insufficient for the ward's maintenance, or the court thinks it is for his benefit to sell, with a view to reinvestment, in which last case the guardian or some other person may be appointed to sell. The supreme court, the superior court of any county containing the land, or the probate court, which appointed the guardian, may act.²⁰⁹ In Maine the application may be made by "friend or guardian" to sell, to lease, to exchange, or to release for a round sum claims for condemnation of land.²¹⁰ In Rhode Island, leave may be given to sell, mortgage, lease, or exchange, in order to pay off debts or taxes, for the ward's support or for reinvestment, and the probate court must give notice by citation, by posting, or by newspaper publication, in like manner as upon the application of an administrator to sell for payment of debts.²¹¹ In New Hampshire the probate court may license the guardian to sell the property of an absent or nonresident parent who neglects to provide for his child,—rather heroic, and hardly constitutional.²¹² In Connecticut the ward's parent or his guardian, foreign or domestic, may apply; and any fit person may be appointed to sell for reinvestment in real estate or securities or for the ward's nurture. The jurisdiction is with the probate court of the district in which a domestic guardian was appointed, or if they have no guardian, or guardians in several districts, by the court of the district in which any part of the land lies.²¹³ In Vermont the sale may be ordered, if needed for maintenance and education, or to pay debts, or if deemed of benefit to him for the purpose of better investment; and here notice must be given "to the persons interested" (which seems to mean the next of kin of the ward), and be published for three weeks before a hearing. The guardian must give a bond with surety, to account for the proceeds. The terms,

²⁰⁹ Massachusetts, Pub. St. c. 140, where the "guardian" of a person of unsound mind or "spendthrift" applies, notice is given to the overseers of the poor.

²¹⁰ Maine, c. 71, §§ 1, 2, etc. Widow's dower may be sold with her consent, she taking her interest in money.

²¹¹ Rhode Island, c. 179, §§ 22, 23; Id. c. 180, § 2, cl. 9.

²¹² New Hampshire, St. c. 178, § 11.

²¹³ Connecticut, Gen. St. § 463.

manner of selling, and of giving notice of the sale must be fixed by the court, and the license, when granted, stands good for two years, and no longer.²¹⁴

In New York the proceeding takes a more deliberate aspect. Where the personalty and income of lands is insufficient for the payment of the debts, or the maintenance of the ward and family, or where his interests require it because the land or his estate therein is exposed to waste, or is wholly unproductive, or for other peculiar reasons or circumstances, an application to sell, mortgage, or lease may be made by the guardian, or by any relative or other person. If the infant be over 14, he must join. The application may be made to the supreme court in the district in which the land, or part of it, is situated. The statute prescribes the contents of the petition; but it seems that if it indicates the grounds, as above stated, on which the sale is asked, the court would gain jurisdiction. A suitable person must be appointed special guardian, who must file his bond to comply with the trust imposed. After a reference, a final order is made, fixing the terms of sale and conveyance. Provision is made for releasing life estates and other contingent interests, by allotting to the holders a proper share of the proceeds, and thus to sell a perfect, merchantable title.²¹⁵

The consent of an infant over 14 is, under the present law, deemed indispensable to a valid order of sale. A contingent remainder may be sold by these proceedings, being covered by the general word "estate," while under the Revised Statutes (i. e. before 1877) only vested interests could be sold. There is no healing clause, a statute of 1878 for curing irregularities having been repealed in 1880, and the requisite steps are so strongly insisted on that the reference to the

²¹⁴ Vermont, §§ 2477, 2478, 2480. Few, if any, reported cases have arisen under guardian's licenses in New England. It may be noticed that the New England and other Eastern statutes contemplate standing trees as the first thing to be sold, before the lands.

²¹⁵ New York, Code Civ. Proc. §§ 2348-2352, 2362, 2363. The surrogate has no power over the estates of infants or lunatics as such, the supreme court being the successor of the late courts of chancery. The first act authorizing the chancellor to order such a sale was passed in 1814. That the infant is bound to convey the land is made one of the grounds for application in section 2348, but hardly belongs under the head of sale.

master or to a referee for proof of the grounds was deemed "jurisdictional" under the old law, which is practically the same as the new.²¹⁶

The present law of Virginia and of West Virginia is literally the same. The application is made by the guardian and is called a bill in equity. The infant, any trustee for him, if the infant's estate is equitable, and persons interested in the property, must be made defendants; for land "held with others" is expressly embraced. Land in possession or in remainder, whether vested or contingent, is within the law, at least since 1853. The petition is addressed to the circuit court as having equity powers, formerly also to "hustings courts." The grounds are very broadly stated. As the infant is made a defendant, there must be process, and, moreover, a guardian ad litem must be appointed and must answer. The wife of an infant husband is authorized to release her dower in aid of the judicial sale.²¹⁷

In Maryland, also, the sale of infants' land belongs to the chancery court. It may be decreed, "if it be for the benefit of the infant," on application of the guardian or of a prochein ami; and so may a mortgage or demise of the land. Remainders or executory devises are within the law. A bill must state the ground for relief, in order to give jurisdiction. There must be an appearance by guardian ad litem, and two witnesses to prove the grounds. Whether a defect in these respects is fatal is yet an open question; but

²¹⁶ The Code of Procedure of 1848, by section 471 retained the law of the Revised Statutes on the subject. No leave of court needed for guardian selling land bid in for debt. *Bayer v. Phillips*, 17 Abb. N. C. 425; *Cole v. Gourlay*, 79 N. Y. 527 (before Code Civ. Proc., joining of infant was only by rule of court); *Dodge v. Stevens*, 105 N. Y. 585, 12 N. E. 759, reversing *In re Dodge*, 40 Hun, 443. Under the Revised Statutes guardian or father had to apply. *Ex parte Whitlock*, 32 Barb. 48; *Jenkins v. Fahey*, 73 N. Y. 355 (as to sale of vested remainder, referring to 2 Rev. St., then page 194, § 170). As to need for reference, see *Ellwood v. Northrup*, 106 N. Y. 172, 12 N. E. 590. A New York act (chapter 311 of the session of 1893) changes somewhat the requisites of the petition on which the jurisdiction of the court depends.

²¹⁷ Virginia, Code, §§ 2616-2626; *Faulkner v. Davis*, 18 Grat. 651; West Virginia, St. c. 83, §§ 2-11; *Hull v. Hull's Heirs*, 26 W. Va. 1; and compare *Hinchman v. Ballard*, 7 W. Va. 175, and *Palmer v. Garland's Com'ee*, 81 Va. 444, where lunatic's lands were sold. *Whitehead v. Bradley*, 87 Va. 676, 13 S. E. 195.

certainly there must be process on the infant and on such other person as must be served on his behalf in other cases.²¹⁸

In New Jersey, on the other hand, the New England view obtains, and the orphans' court may, "upon full investigation," but without following a prescribed form, and without notifying anybody, empower the guardian to sell so much of the ward's lands, as it may direct. Aside of the question whether the applicant is guardian, a question can hardly arise under such a law. The father may now be appointed guardian, but cannot act without appointment. The "proper orphans' court" which is to give the license seems to mean the one from which the guardian holds his appointment.²¹⁹

In Kentucky the first general act enabling a guardian to sell at least descended lands for the ward's benefit, in line with the license laws in other states, was passed in 1813; the petition to be addressed to the circuit court, the want of fiduciary character in the petitioner, or the lands not being held by descent, being almost the only grounds for nullity. In 1852 a broad plan was contrived for selling, by chancery sale, any land of infants, idiots, or lunatics, for maintenance, or for reinvestment; no sale to be made (and such is the law yet) against the terms of the will or deed under which the land is held. The statutory guardian or committee files the petition; all persons interested in the land, other than the ward, are to be made parties, and the guardians of such as are minors. The court was to have jurisdiction only when (1) three commissioners report, under oath, the net value of the infant's estate, the annual profits, and whether the interest of the infant requires a sale; (2) proof be taken, if required; (3) the guardian or committee of each infant or lunatic has given bond. In default of these requisites the sale was void; and this happened so very often that curative acts had to be passed between 1861 and 1866, under which the guardian might, by a new suit, showing that the sale was beneficial to the

²¹⁸ Maryland, Pub. Gen. St. art. 16, §§ 48-53; *Clay v. Brittingham*, 34 Md. 675; *Gregory v. Lenning*, 54 Md. 51 (bill of review).

²¹⁹ New Jersey, "Guardians," 3. See *Graham v. Houghtalin*, supra, note 207; *Morris v. Morris*, 15 N. J. Eq. 239. By an act of April 14, 1891, executors or trustees of lands in which children are interested may be authorized by the chancery court to sell or mortgage them in order to pay taxes or assessments.

infant, have invalid sales made good.²²⁰ In 1873 the General Statutes changed the law, so that the report and proof were no longer jurisdictional; but bond with two sureties must be given and approved before there can be a valid judgment. In 1877 the new Code of Practice introduced the radical change of turning the "petition" into a civil action in which the guardian is plaintiff, the ward defendant; which implies the service of process on the infant as a requisite of jurisdiction. The bond with two sureties before sale is also retained as another requisite; it having been held that an order of sale resting on a bond with only one surety is void. But trust companies have been chartered with authority to give these and all other fiduciary bonds without any surety. An infant married woman must file an answer, acknowledged on privy examination, giving her consent. This also is essential. An amendment enacted in 1894 dispenses with the bond, where the sale is made for reinvestment. In place thereof the court collects the proceeds of sale, and looks to the reinvestment itself.²²¹

In Illinois, before 1877, the guardian applied to the circuit court, or court of equity jurisdiction for leave to sell the ward's lands, but in that year, under the constitution of 1874, the legislature classed this business as "probate matter," wherein it has been sustained.²²² Leave to give a mortgage (which must mature during minority) is given without formality; leave to sell for maintenance or investment, upon a petition, stating grounds, filed 10 days before the term for which notice has been given by publication once a week for three weeks. The petition gives jurisdiction of the subject-matter, notice

²²⁰ See the author's "Kentucky Jurisprudence," §§ 74-76; Rev. St. 1852, c. 86, art. 3, § 2; *Barrett v. Churchill*, supra, note 208; *Barber v. Hopewell*, 1 Metc. (Ky.) 260 (where the lot could have been sold for division); *Gill v. Givin*, 4 Metc. (Ky.) 197 (or where part was properly sold for debt); *Carpenter v. Strother*, 16 B. Mon. (Ky.) 289; *Furnish v. Austin* (Ky.) 7 S. W. 399 (infants not necessary parties under Revised Statutes); *Megowan v. Way*, 1 Metc. (Ky.) 418 (bond must contain all the terms and be approved before judgment); *Higdon v. Lancaster*, 7 Ky. Law Rep. 296 (but judge's indorsement on bond enough). The "bond" has no penalty, and is often known as a "covenant."

²²¹ Gen. St. c. 63, art. 3, § 2; Code Prac. §§ 489-498; *Henning v. Barringer* (Ky.) 10 S. W. 136; *Phalan v. Louisville Safety Vault & Trust Co.*, 88 Ky. 24, 10 S. W. 10; *Barnett v. Bull*, 81 Ky. 127.

²²² Ill. St. c. 64, §§ 24, 28-30; *Winch v. Tobin*, 107 Ill. 212.

gives jurisdiction of the person. Unless the cause is heard or continued at the term named in the notice the license is void. When the ward resides in the state the county court of his residence has jurisdiction; when out of the state, that of the situs of the land or any part of it; and the license is void, though the proceedings recite the residence of the wards in the county, when they are in fact nonresidents.²²³

In the states of Michigan, Wisconsin, Minnesota, Nebraska, and Indiana, the healing clause first enacted in Michigan, and copied by the other states, as shown in our section on sale for decedent's debts (slightly modified in Indiana), covers sales by guardians also; and in Oregon such sales alone. Hence in these states, if there is a license at all, you need only ascertain whether the person named therein was really the guardian, and whether the court granting it was the proper court. The license must be granted by the probate court which has appointed the guardian, and he may be licensed to mortgage the land, in all respects like an administrator.²²⁴ In Indiana the circuit court is now the only court. Maintenance

²²³ *Mulford v. Stalzenback*, 46 Ill. 304; *Knickerbocker v. Knickerbocker*, 58 Ill. 399; *Spellman v. Dowse*, 79 Ill. 66 (on exceptions to report, but long after sale); *Cooter v. Dearborn*, 115 Ill. 514, 4 N. E. 388 (unlicensed sale void); *Kingsbury v. Sperry*, 119 Ill. 282, 10 N. E. 8 (no writ of error from order of license); *Reid v. Morton*, 119 Ill. 123, 6 N. E. 414; *Spring v. Kane*, 86 Ill. 580 (what gives jurisdiction); *Benefield v. Albert*, 132 Ill. 665, 24 N. E. 634.

²²⁴ Michigan, Ann. St. §§ 6076, 6080–6088, 6094, 6098, 6105–6107; Wisconsin, St. c. 171 (see reference in section 4012 to older curative acts, and section 3919); Minnesota, c. 57, §§ 23–36, 51 (healing clause); Nebraska, §§ 1510–1520 (notice for minors to be served on next of kin; proceedings in district court of county of appointment). See, also, the Minnesota probate act of 1889 (chapter 10), giving jurisdiction to the probate court of the appointment; and see section 4000 in Wisconsin St. by which no license to sell minors' land is to be granted, unless the supervisors of the town, mayor of city, or president of the village in which the ward resides shall certify his approval in writing. Quære, is the license void for want of such certificate? See, as to sufficiency of oath before sale, *Persinger v. Jubb*, 52 Mich. 309, 17 N. W. 851; *Schaale v. Wasey*, 70 Mich. 414, 38 N. W. 317; *West Duluth Land Co. v. Kurtz*, 45 Minn. 380, 47 N. W. 1184 (oath of guardian good, though not indorsed as filed); *Blanchard v. De Graff*, 60 Mich. 107, 26 N. W. 849 (same principle). The Oregon statute (§§ 3113–3132) in its healing clause does not require the sale to be confirmed; but quære, would not confirmation be withheld for jurisdictional flaws?

and education, discharge of liens and debts, or reinvestment are the grounds. The court directs the manner of giving notice, but this becomes immaterial by the healing clause. Some of the older cases in these states, arising before the healing clause took effect, and turning on sufficiency of notice, are referred to below. The guardian is to give bond with freehold "sureties," but if he has only one surety on the bond it is not void.²²⁵

In Missouri the guardian may apply for leave to sell, to lease, or to mortgage (borrowing not less than two-thirds of the appraised value), if it be necessary for the "support, maintenance, or education" of the ward; the proceedings to be the same as those by which an administrator obtains leave to sell for the decedent's debts; but no publication need be made to notify parties in interest. The judgment cures any defect as to the papers that ought to be filed on the application. In fact, nearly all the difficulty has arisen as to the sale and its confirmation.²²⁶

In Arkansas "the probate court"—that is, the court by which the guardian was appointed—may, on the application of the guardian, order a lease, mortgage, or sale, in like manner as sales are made by administrators for the payment of debts, and the statute does not, apparently, contemplate any notice to the child, or any one representing his interest. The court aims to sell a good title, as far as the interest named in the license goes. The purchaser need not accept anything less. An act of 1891 extends the grounds or purposes to be stated in the petition almost indefinitely.²²⁷

In North Carolina the application was formerly made in the chancery courts, now in the superior courts, which have all the equity jurisdiction. Though the application is wholly *ex parte*, the infants

²²⁵ Indiana, Rev. St. §§ 2528-2537. See note as to act of 1865 curing orders made in the old common pleas court without notice under section 2533, general healing clause see section 2364. Hardly any flaw will avoid the license. *Walker v. Hill*, 111 Ind. 223, 12 N. E. 387; *McKeever v. Ball*, 71 Ind. 398; *Marquis v. Davis*, 113 Ind. 219, 15 N. E. 251; *Nesbit v. Miller*, 125 Ind. 106, 25 N. E. 148 (sale under petitions asking for leave to make exchange).

²²⁶ Missouri, Rev. St. §§ 5305-5309. See *Strouse v. Drennan*, 41 Mo. 289, as to old law, allowing sale only for "education," not for support. The word "curator," in Missouri, means a limited guardian.

²²⁷ Arkansas, Dig. St. §§ 3502-3504. Grounds extended by chapter 51 of Acts of 1891; *Black v. Walton*, 32 Ark. 321.

putting it forward through their guardian or next friend, it was formerly known as a bill in equity. The next friend ought to be approved by the court, but when he is not so approved,—e. g. when a foreign guardian sues without asking special leave,—the error does not deprive the court of jurisdiction. The supreme court has repeatedly bewailed the loose practice that prevails in this important class of cases, but has never applied the simple remedy of annulling sales irregularly made, by which the land of wards was sacrificed, and the proceeds wasted or misapplied.²²⁸ In Georgia the ordinary is given the same jurisdiction, on the application of the guardian to sell the ward's lands, as he has to license the administrator to sell for the payment of debts; and he is to exercise it in the same manner. But it has been usual to go into equity by "bill" or petition, in which the minors come forward as complainants, dispensing with process, represented by a prochein amy, or may be defendants appearing by guardian ad litem. The validity of decrees rendered has been strongly doubted, but at last sustained, in a case where the sale was made even in defiance of the will under which the minors held the land.²²⁹

In Ohio the proceeding begins with a petition by the "guardian of the estate" (none else) to the "proper probate court," which seems to be the one from which he holds his appointment, and may state as ground and purpose either need for maintenance, the payments of liens or debts, or a better investment. The guardian of several joint owners may embrace their interests in one petition. The infant, his or her wife or husband, and next in descent must be made parties, which involves process in the ordinary way. The statute sets forth the contents of the petition in great detail, but the decisions are very liberal. The lack of the bond demanded before a sale does not avoid

²²⁸ North Carolina, Code, §§ 1602, 1603. As to next friend, see section 180. Williams v. Harrington, 11 Ired. 616; Sutton v. Schonwald, 86 N. C. 198; Morris v. Gentry, 89 N. C. 248; Tate v. Mott, 96 N. C. 19, 2 S. E. 176. The true character of the pretended guardian, it will be seen, is here immaterial.

²²⁹ Georgia, Code, §§ 1828, 2559. Section 4214 allows guardian ad litem to consent for infants to entering decree in vacation. Sharp v. Findley, 59 Ga. 722, leaves jurisdiction of equity in doubt; Southern Marble Co. v. Stegall, 90 Ga. 236, 15 S. E. 806, affirms it. See, also, Rakestraw v. Rakestraw, 70 Ga. 806; Prine v. Mapp, 80 Ga. 137, 5 S. E. 66 (guardian ad litem not essential; death of surety on bond immaterial).

it; neither does looseness in the description, or other slight irregularities. The decisions under the old statute have always been very favorable to the purchaser.²³⁰

In Pennsylvania the guardian may apply for leave, either to sell or to mortgage, to the orphans' court from which he holds his appointment. No notice to any one is required. The grounds on which the sale may be asked are wide enough to cover all cases; and, if the applicant is guardian, and the license granted by the proper court, there seems to be no room for going behind it, no matter how defective the record. The statute requires a bond before the guardian is allowed to sell, but in the spirit of the Pennsylvania courts of upholding all sales this is considered as "directory" only.²³¹

In Mississippi the application must be made to the chancellor, either for the ward's maintenance or for better investment. Summons must be served on three of the nearest kindred of the minor, and a bond must be given by the guardian, if required; and, if required and not given, the sale is void. The oath by which the petition should be verified is immaterial; but the notice is the basis of jurisdiction. A summons without previous order is enough.²³²

In Alabama the application is made by the guardian to the county court as a court of probate, either on the ground of maintenance or of a better investment. If the application proposes distribution among several wards as the object, the order is void, though a sale for such a purpose might be ordered on a proper showing. The court has no power to order a private sale.²³³

The California statute, which has been closely followed in Wash-

²³⁰ Ohio, Rev. St. § 6280-6284; *Mauarr v. Parrish*, 26 Ohio St. 636; *Arrowsmith v. Harmoning*, 42 Ohio St. 554; *Maxson's Lessee v. Sawyer*, 12 Ohio, 195 (under old acts, sustains the power of the appointing court over land in other counties).

²³¹ Pennsylvania, Dig. "Deceased's Estates" 121, § 3 et seq.; *Pry's Appeal*, 8 Watts, 253; *Davis' Appeal*, 14 Pa. St. 371 (looseness of keeping orphans' court records); *Lockhart v. John*, 7 Pa. St. 137; *Smith v. Biscailuz*, 83 Cal. 344, 21 Pac. 15, and 23 Pac. 314.

²³² Mississippi, Code, §§ 2203, 2205; *Eldridge v. McMackin*, 37 Miss. 72; *Vanderburg v. Williamson*, 52 Miss. 233; *Williamson v. Warren*, 55 Miss. 199. See, also, *Stampley v. King*, 51 Miss. 728.

²³³ Alabama, Code, § 2148 et seq.; *Hudson v. Helmes*, 23 Ala. 585; *Mohon v. Tatum*, 69 Ala. 466.

ington, and nearly so in Montana and Idaho, requires no less than nine facts to be set forth in the petition which is presented to the appointing court as a basis for jurisdiction. But the omission of those points only that are essential in the particular case will vitiate the judgment. Thus, where the sale is asked for reinvestment, it is only necessary to state the condition of the particular lot which the guardian asks to have sold. Such a description of the land to be sold as will identify it must be set forth in the petition before the court has jurisdiction to proceed. Either maintenance or better reinvestment is now a good ground. An order is issued to the next of kin of the ward and all parties in interest, which is either personally served or published once a week for three weeks, unless all waive notice by written consent. The order must specify the land to be sold so that it may be found without resort to other documents. A bond must be given. Its absence is fatal.²³⁴

In Oregon a sale may be had for maintenance or reinvestment on the lines of the Minnesota statute. It was held in a well-considered case that the healing clause protects the purchaser in good faith against a defect in the title to the office or trust of the guardian who applies for, and sells under the license. A clause in the Code of Procedure, under which the county court may order a sale or "disposal" of the land of infants, has been construed to authorize a license to mortgage them.²³⁵

In Kansas the jurisdiction is in the probate court which appointed the guardian. For the purpose of either maintenance or of better investment or of improvement, it may license either a sale or mortgage, or laying the property out into town or city lots. Land in other counties than that in which the court is held may be so ordered to be sold or mortgaged. Nothing is said about a bond or oath, the duty of selling land, when necessary, and accounting for its proceeds being embraced in the oath and bond taken and exe-

²³⁴ California, Code Civ. Proc. §§ 1768, 1777-1788; Washington, §§ 1144-1147 (with reference to sections on administrator's license). Fitch v. Miller, 20 Cal. 352; Hill v. Wall, 66 Cal. 130, 4 Pac. 1139 (order to sell 21 acres of named ranch).

²³⁵ Oregon, St. § 895 (Code Civ. Proc.) and § 3113; Trutch v. Bunnell, 5 Or. 504; Walker v. Goldsmith, 14 Or. 125, 12 Pac. 537; Gager v. Henry, 5 Sawy. 235, Fed. Cas. No. 5,172.

cuted when the guardian first qualified; and under the older law the omission of the bond was cured by the confirmation of the sale.²³⁶

The Revised Statutes and Code of Procedure of South Carolina are silent as to sales of infants' estates, and the courts are in doubt whether such power is contained in the broad terms in which probate jurisdiction is conferred on the probate judges. They are, however, very liberal, we might say loose, in allowing the land of an infant to be charged with debt, not only by the guardian, but even by the mother.²³⁷

In Texas the statute authorizing guardians to sell the land of infants has been taken very loosely as to the steps following the judgment, and would probably receive, as to the judgment itself, the same wide interpretation as that on sales by administrators; that is, the purchaser need not look beyond an order made by the proper county court,—the court by which the guardian was appointed, and before which he settles his account.²³⁸

In Iowa, unless forbidden by the will under which the infant holds, his guardian may apply to the circuit court for leave to sell or mortgage his land, either for support and education or to promote the ward's interest, if the land be unproductive or going to waste. A copy of the petition with notice attached is served personally on the minor, besides such notice by publication as the court may prescribe. A failure to give the notice is fatal; but a defective notice (e. g. service before the guardian is appointed) leaves the judgment good against collateral attack. A license to mortgage, given on a petition for leave to sell, is void, not being responsive to the notice.²³⁹

²³⁶ Kansas, St. §§ 3243–3246. For a case of void sale, see *McKee v. Thomas*, 9 Kan. 343. Not void for want of bond, *Watts v. Cook*, 24 Kan. 278; *Howbert v. Heyle*, 47 Kan. 58 (a description, informal, but identifying).

²³⁷ *Shumate v. Harbin*, 35 S. C. 521, 15 S. E. 270; *Rhode v. Tuten*, 34 S. C. 496, 13 S. E. 676; *Harrison v. Lightsey*, 32 S. C. 293, 10 S. E. 1010. The time for selling may be extended without a new application. *Butler v. Stephens*, 77 Tex. 599, 14 S. W. 202.

²³⁸ Texas, Rev. St. art. 2576 et seq. The decisions on what is a confirmation of the sale will also be found very liberal.

²³⁹ Iowa, St. §§ 2257–2265; *Lyons v. Vanatta*, 35 Iowa, 521; *Rankin v. Miller*, 43 Iowa, 11; *Haws v. Clark*, 37 Iowa, 355 (notice setting no time, or time in vacation, is void); *Foster v. Young*, 35 Iowa, 27 (what is meant by mortgage); *Hamiel v. Donnelly*, 75 Iowa, 93, 39 N. W. 210 (irregular process);

In Colorado the application of the guardian, preceded by a publication in a newspaper, or notices posted at three public places in the county for three weeks, is made by petition in writing to the district court, stating as the object either the maintenance of the ward, or the investment of the proceeds in other lands. The court fixes the terms, time and place of sale, and what security shall be given by the guardian and the purchaser. The notice by newspaper or poster seems to be the basis of jurisdiction; but there has hardly been time to test the validity of sales under the act. The Wyoming statute is substantially the same.²⁴⁰

In Florida, as long as a decedent's estate is not wound up, the administrator or executor, and otherwise the guardian, may apply to the county, or circuit judge of the county, in which land of infant heirs or devisees is situate, for an order of sale of such land, whenever there are circumstances which, in the opinion of the judge, require it. Notice that such application will be made is first to be given for four weeks in some newspaper. If the lands lie in different counties, application must be made in each. The judge orders the sale to be made by the commissioner and separate bond is to be given before the sale takes place. It is still an open question whether the lack of this bond would avoid the sale; properly it should, and the statute ought to be construed strictly throughout as all the orders are made, in the words of the statute, not by the court, but by the judge.²⁴¹

The Tennessee law on this subject deserves particular mention. The courts of that state insist that the chancellor has inherently the power to deal with the landed interests of all persons laboring under disability. A statute has, however, since 1827, regulated the sale of infants' estate, when such a sale becomes necessary for the infants' own benefit. Any interest may be sold, whether in possession, reversion, or remainder, vested or contingent, and it will be

Bunce v. Bunce, 59 Iowa, 533, 13 N. W. 705 (lack of bond not fatal); *Shawhan v. Loffer*, 24 Iowa, 228 (affidavit as to posting not indispensable); *McMannis v. Rice*, 48 Iowa, 261 (license to mortgage on petition for sale).

²⁴⁰ Colorado, Gen. St. § 1594; Wyoming, § 2259 et seq.

²⁴¹ Florida, Rev. St. §§ 1924, 1925, 2100. *Coy v. Downie*, 14 Fla. 544, speaks of deed by guardian being void for noncompliance with the law, but does not point out the flaw.

seen hereafter that the machinery of this law is used for the sale and reinvestment of settled estates. The proceeding is carried on in a chancery court, either of the county in which the land is situated or of the county in which the infant (or person of unsound mind), or one of several, resides. The guardian must apply. His bill or petition must describe the land and the estate to be sold, and allege the grounds, showing the interests of the infant require the sale. The court may, in its discretion, assent on behalf of the infant; and the decree is not void for lack of proof. The statute is not very clear as to the manner of bringing the infants before the court; but it most imperatively demands such a decree that the proceeds of sale must be paid into court, to be used by it for the infants, either by way of reinvestment or otherwise.²⁴² The statute, like many of its counterparts in other states, does not allow a sale under its provisions, when forbidden by the deed or will under which the land is holden.²⁴³

In the District of Columbia the Maryland act of 1798 is still in force, under which the sale of infants' land could be ordered by the orphans' court, with the approval of the court of chancery. The place of the latter is now taken by the supreme court of the district.²⁴⁴ No notice is necessary for obtaining the order. Equitable or trust estates and remainders under a trust may be sold under the law.²⁴⁵

A jurisdiction wholly different from that spoken of throughout this section has been lately conferred by the legislature of Maryland upon the chancery courts of that state. A woman between the ages of 18 and 21 may apply to such court, by petition, for leave to give

²⁴² Tennessee, Code, §§ 4054—4069; *Mason v. Tinsley*, 1 Tenn. Ch. 154 (payment into court imperative). See, hereafter, "Sale of Settled Estates."

²⁴³ Now section 4071, formerly section 3340. See *Porter v. Porter*, 1 Baxt. 301, and comments upon it in *Hurt v. Long*, 90 Tenn. 445, 460, 16 S. W. 968. The supreme court of Tennessee says: "[This] case intimates—what is doubtless true—that the chancery court, by virtue of its inherent power, might, in a proper case, decree a sale contrary to the provisions of Code, § 3340." Elsewhere it is said this power of the chancery court extends to the validation of a void or voidable sale for the interest of the infant, and is well settled. *Lancaster v. Lancaster*, 13 Lea, 132.

²⁴⁴ *Thaw v. Ritchie*, 136 U. S. 519, 10 Sup. Ct. 1037.

²⁴⁵ See *Abert*, Dig. 1894.

a "deed of trust" on her land for the purpose of borrowing money; and the order or decree rendered on such petition (which is wholly *ex parte*) will make her deed available.²⁴⁶

§ 152. Land of the Insane.

The common law as amended or declared by the statute de prærogativa regis in the days of Richard II. knows of no way or method for selling the lands of the insane. That act vests the chattels of such persons in the crown, together with the profits of their lands, while they remain of unsound mind, subject to the duty of maintaining the unfortunate and his family thereout. If he is a lunatic,—that is, have lost his mind after birth,—the surplus must be accumulated for his benefit, the crown being a mere trustee; if an idiot,—that is, without mind from his birth,—the surplus belonged to the crown. Thus stood the law until 1802. The chancellor who held the king's commissions under the sign manual, to exercise his guardianship over lunatics, had not even the power to sell his leasehold estates, let alone the fee of his lands. The first act of parliament conferring such a power upon him was passed in that year.²⁴⁷

The American states at first dealt with this problem by private acts, as with that of infants' lands, where the necessities of the owner called for a sale; and, soon after general laws were enacted authorizing the courts to deal with infants' lands, similar laws followed for the less frequent sales of the lands of lunatics. In an early Illinois case a circuit court ordered such a sale with no other warrant than its inherent equity powers, to enable the "conservator" (i. e. committee) to maintain his ward; and in 1875, without any aid from the bar of limitation, the supreme court approved of this exercise of power.²⁴⁸

In the statutes of many states one clause prescribes the same steps

²⁴⁶ Sess. Acts Md. March 31, 1890.

²⁴⁷ 17 Edw. II. cc. 9, 10. Ex parte Dikes, 8 Ves. 79, where Lord Eldon said he was willing to sell the leasehold, if a purchaser could be found; but he could not promise him a good title. This led to St. 43 Geo. III. c. 75.

²⁴⁸ Dodge v. Cole, 97 Ill. 338. It was here laid down as the law of Illinois that the validity of the "conservator's" appointment, like that of an administrator, cannot be collaterally inquired into after a competent court has recognized it by license or decree of sale.

to be taken when the committee wishes to sell the lands of a lunatic as when a guardian proposes to sell those of his minor ward, or there is only a slight modification, either in the grounds justifying the sale or in the designation of those who must be notified. In fact, the words "guardian and ward" are in the New England states freely applied to the committee and to the lunatic under his charge.²⁴⁹ In these states, and in New Jersey, Pennsylvania, and a few others, spendthrifts and habitual drunkards may be put under guardianship; and like process is used for selling their lands, with somewhat more provision however, for notifying them in person.²⁵⁰ Where land is held by persons under disability jointly with others, a suit to sell the whole and divide the proceeds is often resorted to as a short cut to the conversion of their landed interest into money; and this is done in the case of lunatics, either on the general ground that the remedy applicable to part owners generally is not ousted by the disability of one or more of them, or under the express words of a statute allowing such sales to be ordered, though some of the part owners be infants or of unsound mind.²⁵¹

But coming to the proceedings which are carried on avowedly for the benefit of the insane person, we find that the grounds given by the statute for the application are nearly the same as when the owner is an infant; that is, on the one hand, maintenance and support of the owner or of his family (the word "education" is not here applicable), or by way of reinvestment; and as to the latter there is hardly such material difference in the law that a sale made of a lunatic's land would be void if made on grounds which would sustain the sale of an infant's land. But there are some material distinctions in bringing home notice of the application to those who are

²⁴⁹ E. g., those of Maine and Vermont make no apparent distinction. In New York and in Kentucky the Codes of Procedure (or Practice) start out with applications for sales of both kinds. The divergences are noted at the successive steps. In Minnesota, c. 57, §§ 23, 25, which authorize sales by guardians, committees are tacitly included, and wards include lunatics.

²⁵⁰ In the Pennsylvania Digest of Statutes a chapter is headed "Lunatics and Habitual Drunkards."

²⁵¹ Bryant v. Stearns, 16 Ala. 302; Kentucky, Code Prac. § 490. The old Kentucky Code of Practice (1854) gave the sale for division only when some of the parties were under disability; and it is seldom used anywhere unless this is the case.

deemed interested. Thus in New York there is no notice, but an inquiry by a referee; in Kentucky the wife and children of a lunatic, if he has any, must be made parties defendant in a suit by the committee against him for the sale of his lands;²⁵² and there are similar requirements in the statutes of Pennsylvania. In some of the New England and Northwestern states the proceedings are exactly alike for minors and for the insane. In Massachusetts the overseers of the poor are thought to be most interested, and hence are to be notified.²⁵³ As disputes arising from the sale of lunatics' lands are comparatively rare, we cannot well give an abstract of all these statutes. In Pennsylvania, where the courts have otherwise gone as far as any to stand by judgments and judicial sales, very lately a sale of a lunatic's land was held void in an ejectment, because there had been a failure to notify "the wife, if any, and the next of kin, who are capable of inheriting."²⁵⁴ The cases in Wisconsin arising out of a license to sell a lunatic's land, which was granted after a shorter publication than the law prescribed, are noteworthy; the highest state court first treating the license as void, the supreme court of the United States, on behalf of another nonresident purchaser, sustaining it, and the supreme court of the state, in a suit against a third purchaser, receding from its first position, and rec-

²⁵² New York, Code Civ. Proc. §§ 2351, 2353 et seq. This provision is imperative. Judgment to sell, without reference to support it, is void. *In re Valentine*, 72 N. Y. 184. See, also, as to these proceedings, *Agricultural Ins. Co. v. Barnard*, 96 N. Y. 525. Kentucky, Code Prac. § 492, subsec. 3; Pennsylvania, Dig. "Lunatics and Habitual Drunkards," 37 (section 24 of act of 1836).

²⁵³ Wisconsin, St. § 3999; Minnesota, St. c. 57, § 29 (publication for four to eight weeks in either case); Massachusetts, c. 140, § 14, requires such notice to be served in person and on an overseer, aside of the publication in other cases. Maine, only for ward "not a minor nor insane." In Connecticut the probate court can license only mortgaging; no notice required. See Gen. St. § 483. Vermont, § 2478 (publication same as against infants).

²⁵⁴ *Bennett v. Hayden*, 145 Pa. St. 586, 23 Atl. 255 (the petition must state that notice has been given). An act of 1853, enlarging the grounds for selling lunatic's lands, is held inapplicable. *In re Hunter's Estate*, 84 Iowa, 388, 51 N. W. 20 (an order authorizing a lunatic widow's committee to elect for her is held void for want of notice, the court taking the ground that whenever the statute, by requiring notice, makes the proceeding adversary, it is such).

ognizing the decree as valid; it seems, on the ground that the committee who had petitioned for the license himself represented the lunatic; while the United States supreme court rather took the ground that it had in the noted case of *Grignon's Lessee v. Astor*, laid down as law for Michigan, of which Wisconsin was then a part, that all such proceedings should be considered in rem, and not depending upon notice for jurisdiction.²⁵⁵

There has been a tendency in late legislation towards mortgaging, rather than selling, the lands of those under disability. Under an Ohio act of recent date the probate court may authorize the guardian or committee of a lunatic to borrow money on his land by mortgaging it, when it appears to the court necessary, on the same grounds on which heretofore he might have applied for a sale.²⁵⁶

In the last few years statutes have been passed in almost every state under which the committee of an insane wife or husband can be authorized by the proper court to join with the sane husband or wife in the sale of land of the sound party, either when the wife's signature is needed to release dower or homestead right, or when the wife cannot convey without the husband's co-operation. Such acts are found in Massachusetts, Ohio, and Kentucky, aside of such acts like that of Minnesota, in which a judicial finding of insanity of either spouse gives full powers of conveyance to the other.²⁵⁷

§ 153. Sale for Division.

The writ of partition, given to coparceners by the common law, was, by statutes of 31 and 32 Henry VIII., extended to joint tenants and tenants in common, and partition in equity has long been in use in England and those American states which from the beginning adopted the equity system. But neither the common law nor the equity rule of partition knows aught of selling the land in order

²⁵⁵ *Mohr v. Tulip*, 40 Wis. 66; *Mohr v. Manierre*, 101 U. S. 417; *Mohr v. Porter*, 51 Wis. 487, 8 N. W. 364. The notice of application had been published three weeks instead of four.

²⁵⁶ Ohio, Sep. Acts March 30, 1892.

²⁵⁷ Kentucky, Act of 1878 (Gen. St. 1894, § 2145), passed on in *Fichtner v. Fichtner's Assignee*, 88 Ky. 355, 11 S. W. 85; Ohio, Act of April 13, 1894 (probate court may approve sale or compromise of dower or lunatic wife or husband). Massachusetts, Act March 19, 1889. Compare c. 5, § 58.

to divide its proceeds. The nearest approach thereto was "oweltly of partition" paid by the allottee of the larger tract to that of the smaller; and this was anciently done, rather out of the profits year by year than in a lump sum.²⁵⁸

All American states have conferred on their superior courts of law and equity the power of dividing lands among part owners; and most of them, also, on the probate courts, the latter having a more or less extended jurisdiction.²⁵⁹ Generally, in those states in which the probate court can "license" guardians and administrators, they have also more extended powers in ordering the sale of lands, generally of coheirs or joint devisees, for division among the part owners. In a number of states this power can be exercised by allotting a tract to one or more part owners, according to an appraisement first made, on condition that the allottee or allottees pay to his or their companions their proper shares of the appraised value; and the judgment of allotment is always understood not to carry the title until the shares in money are paid to the others or secured to their satisfaction, or secured, at least, in such way as the court prescribed; for the court cannot transfer the estate of one child to another. This right to take the land and pay out in money is, under these statutes, given to the eldest coheir of the same sex, and to males by preference over females. In Pennsylvania, under an act of 1856, the tract is allotted to the part owner who will pay the greatest excess over the appraised value. This is a near approach

²⁵⁸ Littleton, § 251, has been quoted showing that oweltly of partition by yearly payments out of the income could be adjudged at common law. But Mr. Story understands the passage in Littleton to refer only to partitions in pais. The words "oweltly of partition" are applied in American statutes quoted below to the sum in gross to be paid by the part owner to whom a tract is allotted in lieu of partition. The bond given is a lien, not only on the shares acquired by reason thereof, but also on the original share. Appeal of Snively, 129 Pa. St. 250, 18 Atl. 124; Dobbins v. Rex, 106 N. C. 444, 11 S. E. 260. In Kentucky the courts have, by reason of the statute providing a sale, no longer the power to award oweltly of partition. Wrenn v. Gibson, 90 Ky. 189, 13 S. W. 766.

²⁵⁹ This part of the statute will be found generally among those on partition in its wider sense, which will be quoted under that head. In New Jersey, besides the proceeding in the orphans' court, and that in equity, there is an application to the judge of the supreme court or common pleas. "Partition," 1.

to a sale. As a rule, the allotment does not change the title until the money equivalent is paid or secured to the other shareholders.²⁶⁰ But an actual sale to strangers, carried on like a judicial sale, or, at least, like a sale by license, is now authorized by statute in every state, either in the court trying civil actions and in the probate court, or in the former alone. The proceeding in the probate court is generally limited to a division among heirs or devisees, when the estate of a decedent has not yet been wound up; and it has been held in Minnesota that it cannot be set on foot with effect after the administration has been closed.²⁶¹ But partition in the superior law or equity court is independent of the origin of title; and while, strictly speaking, equity should not make partition while the right to the shares is disputed, the partition or sale in lieu thereof could hardly be attacked collaterally, because the chancellor had encroached on the province of the common-law court.²⁶² On the other hand, the probate court is in many states forbidden to entertain disputes of title among the parties, or among them and strangers. Its judgment simply defines the metes and bounds which are to take the place of the aliquot shares, which it recognizes, and does not conclude any rights to shares, which are not alleged.²⁶³

Sale for the purpose of division is, in New York and New Jersey, and in some other states, adjudged in a suit brought originally for partition in kind, after the commissioners appointed to make such

²⁶⁰ Connecticut, § 626; Michigan, § 5972; Minnesota, c. 56. § 11; Vermont, § 1288; Wisconsin, § 3919; New Hampshire, c. 243, § 26; Massachusetts, c. 178, § 48. See, for a case in which an allotment was considered and sustained, *King v. Reed*, 11 Gray, 490; Florida, § 1496; Pennsylvania, "Partition," 25 (Act of 1856). No title till payment, etc. *Harlan v. Langham*, 69 Pa. St. 235. Formerly the law in Delaware. Same ruling as to title. *Townsend's Lessee v. Rees*, 2 Har. (Del.) 324; *White v. Clapp*, 8 Metc. (Mass.) 365.

²⁶¹ *Hurley v. Hamilton*, 37 Minn. 160, 33 N. W. 912, and note (words of the statute).

²⁶² In Kentucky the equity court of the county of probate or administration has cognizance of sale for division among heirs and devisees, though the estate has long been closed. *Code Prac.* § 66; *Phalen v. Louisville Trust Co.*, 10 Ky. Law Rep. 663, overruling *Girty v. Logan*, 6 Bush, 8. See 4 Kent, Comm. 365, as to old limits of equity jurisdiction. And see next section as to local jurisdiction in partition suits.

²⁶³ In the absence of statute (list of which see below) the administrator is not a proper party.

partition have reported in favor of the former course, while in other states, e. g. in Kentucky, the grounds for sale are alleged in the first instance in a suit brought only with a view to a sale. In this state and wherever such proceeding is carried on in a court with full equity powers, it is adversary; and, if the subject-matter and the parties are properly before the court, it has plenary power; and the decree of sale, though the statutory forms and requisites may not have been fully pursued, is as binding as if it had been made in the enforcement of a mortgage or lien.²⁶⁴ This principle has been extended to a decree of sale for partition made in the county court at the instance of an improper party.²⁶⁵ But it has been held in Maryland that, where the bill praying for such a sale is bad on demurrer, the court has no jurisdiction,—a rather dangerous doctrine, as it leaves to the court no right to decide on anything but the proofs, and makes every decree that is mistaken on the equity of the bill a nullity.²⁶⁶ There are other cases of like tendency. Thus, it has been held in Alabama that the court has no jurisdiction where the suit is brought by a party having no interest, or where the petition does not set forth the several interests or shares of the parties; and in an old New York decision it was held that, under a statute requiring the grounds for a sale to be proved to the satisfaction of the court, the court has no jurisdiction

²⁶⁴ Rivers v. Durr, 46 Ala. 418, claiming an inherent power of equity to convert infant's lands, on the authority of Ex parte Phillips, 19 Ves. 117; Todd v. Dowd's Heirs, 1 Metc. (Ky.) 281. Small irregularities, such as infant suing by next friend, without accounting for lack of guardian, not fatal. Henning v. Barringer (Ky.) 10 S. W. 136; Eller v. Evans, 128 Ind. 156, 27 N. E. 418 (where the dower tract, after being laid off, was sold with the rest, sale not void). In Kentucky land cannot be sold for division, when the infant's interest is one in remainder or reversion only. Such a sale does not give a good title. Malone v. Conn, 95 Ky. 93, 23 S. W. 677 (in such a case the land must be sold for reinvestment). See *infra*.

²⁶⁵ Reed v. Reed, 107 N. Y. 548, 14 N. E. 442 (tenant by courtesy suing). See Beckham v. Duncan (Va.) 5 S. E. 690, where the court of appeals sustained a suit to sell for partition brought by a judgment creditor of a part owner.

²⁶⁶ Tomlinson v. McKaig, 5 Gill, 256, approved in Slingluff v. Stanley, 66 Md. 220, 7 Atl. 261. But in Dugan v. Mayor, etc., of City of Baltimore, 70 Md. 1, 16 Atl. 501, a sale of an undivided one-fourth for division among its part owners has been adjudged and made, and, though erroneous on its face, it was held to be valid.

to sell, where the record shows that no proof was taken. A much later New York decision, perhaps now overruled, held that a partition made at the instance of one for whose benefit an active trust was declared was void.²⁶⁷

Where, under the statute, a suit in equity to sell for division must be brought by a part owner against his companions a dowress cannot institute such a suit against the only heir and owner in fee; for she and he are not joint tenants, tenants in common, or parceners; and the decree is void, though, if she had obtained a like decree against several coheirs, it would be, at most, erroneous by reason of her not being the proper plaintiff.²⁶⁸ In the case last quoted, and in many others, the sale for division has been resorted to as a short cut to the conversion of infants' land into money without complying with harder terms demanded by law in a direct proceeding. To sell for division when all the part owners are infants looks like an abuse of the law allowing such a sale as a substitute for partition only.²⁶⁹ No benefit resulting to the infant need be shown, nor necessity to raise money. The plaintiff in such a proceeding, as in one for partition in kind, claims the sale as a means to sever his interest as of right.²⁷⁰

²⁶⁷ *Johnson v. Ray*, 67 Ala. 603; *Gallatian v. Cunningham*, 8 Cow. 361; *Harris v. Larkins*, 22 Hun, 488; *Howell v. Mills*, 56 N. Y. 226; *Sullivan v. Sullivan*, 66 N. Y. 37.

²⁶⁸ *Liederkrans Soc. v. Beck*, 8 Bush (Ky.) 597 (where the purchaser at the decretal sale was released from his bid, as the decree would not pass the infant heirs' title).

²⁶⁹ The writer has, in his Kentucky Jurisprudence (page 678), not finding any authority on the subject, expressed his own opinion against the jurisdiction of the courts of equity in that state to sell for indivisibility when all the joint owners are under disability. He has found no direct authority in other states in which the language of the statutes is ambiguous. In Kentucky the plain reading of the statute is that all parties on one side shall be under disability, all on the other side free from it. Where the sale is made by the administrator by way of distributing the estate there is less reason for the distinction. The Maryland statute (quoted below), however, expressly includes all cases,—all adults, all infants, some infants. So, also, that of Alabama. In New York it was decided that the law of 1811, by which land is sold for division, does not apply when all the part owners are infants. *Gallatian v. Cunningham*, 8 Cow. 361, where the reasons against either partition or sale for division among infants only are very forcibly stated.

²⁷⁰ It is said in *Bentley v. Long Dock Co.*, 14 N. J. Eq. 480 (compare Rosen-

The ground required by the statute for putting a sale and division of proceeds in place of partition by metes and bounds is differently stated. It is, in New York and New Jersey, "that the property or a tract is so circumstanced that a partition cannot be made without great prejudice to the owners"; and this is substantially followed in Michigan; in Wisconsin (on a report of the referee to that effect); in Minnesota, "without prejudice or inconvenience to the owners"; in Nebraska, if it appears "to the referees that partition cannot be made without great prejudice." In Mississippi a sale is ordered when it will promote the interest of all parties, or when a partition cannot be made; in Kentucky, when the land "cannot be divided without materially impairing its value, or the value of the plaintiff's interest therein," besides the other ground that each share is worth less than \$100; in Maryland, when it "cannot be divided without loss or injury to the parties interested"; in Connecticut, when a sale will better promote the interests of the owners, and when the interests are different, and, moreover, the real estate cannot be conveniently used and occupied by the parties together; in Delaware, if a partition will be detrimental to the interest of the parties; in Pennsylvania, in a suit for partition in equity, when real estate cannot be divided, without prejudice to the interests of the owners; in Alabama, if the land cannot be equitably (in the older law, "beneficially, fairly, and equitably") divided. In New Hampshire the land is allotted, and, if none will accept, and it cannot be divided without great prejudice, it is sold; in Massachusetts, sold, if it cannot be divided without damage to the owners; in Maine, "without great inconvenience." In Rhode Island, a court of equity, on bill for partition, orders a sale at its discretion (and such judgment of a superior, common-law, or equity court would be effective almost everywhere for the purposes of collateral attack). In Vermont there is a sale if a partition cannot be had, "without great inconvenience to the parties interested"; in Kansas, "if partition cannot be made"; in Ohio, when the commissioners in partition report that the estate cannot be divided according to the demand of the writ without manifest injury to its value, and none of the parties elects to take

krans v. Snover, 19 N. J. Eq. 420), that the hardship of giving partition as a matter of right led to the act of 1816 of that state substituting a sale where the partition in kind would work great prejudice.

it at their valuation; in Indiana, if the commissioners for partition report that the whole or any part cannot be divided without damage to the owners; in Illinois, when it cannot be divided without manifest prejudice to the owners, and the commissioners so report; in Iowa, when, in a suit in equity for partition, it is apparent, or the parties so agree, that the property cannot be equitably divided into the requisite number of shares; in Missouri and in Arkansas (with the addition, in the former state, that an inability to lay off dower is also a good cause), when the commissioners report, and the court finds, that the land or any one lot is so situated that partition cannot be made without great prejudice to the owners. In Virginia and West Virginia, if partition cannot conveniently be made, or if the interest of those interested will be promoted, the "subject" may be allotted, and, if none will take it, sold; in North Carolina, when actual partition cannot be made without injury to some or all of the parties interested. In South Carolina there is a sale if the partition in kind or by allotment cannot be fairly or impartially made; in Georgia, when, in a partition suit, the court finds that a fair and equitable division in kind, by reason of improvements, or because the land is valuable for mining, mills, or machinery, or because the value of the entire lands will be depreciated by partition; in Florida, when the commissioners report that a partition cannot be had without great prejudice to the owners; in Tennessee, when the lands are so situated, or of such description, that they cannot be divided, or when they cannot be advantageously divided; in Texas, if the commissioners report that the property cannot be divided without greatly diminishing its value; in California, Nevada, Oregon, Idaho, Montana, and Washington, if it appears from the evidence in a partition suit, with or without averment in the complaint, that partition cannot be made without great prejudice to the owners (a way of putting it which secures the decree of sale against all collateral attack on the merits); and, in California, moreover, as to city or town sites, a sale may be ordered after survey, when the court finds an equitable partition of the whole property is impracticable); in Colorado, when lands, houses, or lots are so circumstanced that division cannot be made without manifest injury to the owners, and commissioners in partition so report. In the Dakotas and in Oklahoma, a tract may be allotted to a part owner if it cannot be divided without injury,

or sold, upon the report of the commissioners that it cannot be otherwise fairly divided.²⁷¹

In the states in which lands do not, under the statute, "descend" to the heirs, but are to be "distributed" to them by the administrator, the latter is, generally speaking, as such, empowered to apply to the probate court for a sale of lands with a view to distribution, on the principle of law there prevailing, that land is "distributed" to the heirs and devisees like personalty. Generally speaking, the probate court has no power to conclude third parties, but can only sell such title as the decedent may have, as we have already seen in the section on the "Administrator's License." In Connecticut a majority of the parties in interest must join with the administrator in the application.²⁷² In the states which have not adopted a modern "Code of Procedure," harmonious in all its parts (and among these are the New England states), the methods for bringing absent or infant defendants before the court are not the same in all actions and proceedings, and the statute on partition in kind or by sale often directs the notice to be given in a different way from that which is proper in an ordinary suit or action. These proceedings are sometimes treated as proceedings in rem, and greater room is

²⁷¹ New York, Civ. Code Proc. § 1532; New Jersey, "Partition," 16; Michigan, § 7882; Wisconsin, § 3119; Minnesota, c. 56, §§ 11, 12 (allotment first, sale next); Nebraska, § 5281; Mississippi, § 3100 (old § 2559); Kentucky, Code Prac. § 490 (the estate in possession must be owned jointly); Maryland, art. 16, § 116 (old § 99); Connecticut, § 1307, and, as to coheirs and codevisees, § 626; Delaware, c. 86, §§ 10, 14 (upon report of commissioners in suit for partition); Pennsylvania, "Real Estate," 2; Alabama, Code § 3258; New Hampshire, c. 197, §§ 5, 6; Massachusetts, c. 178, § 26; Maine, c. 88, § 12; Rhode Island, c. 230, § 16; Vermont, §§ 1288, 1289 (in county court, which here is the higher civil court, public sale only ordered when none of the parties will accept); Kansas, §§ 4728, 4729 (allotment at appraised value first, sale if none will take); Ohio, §§ 5762-5764; Indiana, § 1199; Illinois, c. 106, § 26; Iowa, § 329 et seq.; Missouri, § 7163; Arkansas, Dig. St. § 4804; Virginia, § 2564; West Virginia, c. 79, § 3; North Carolina, § 1904; South Carolina, Gen. St. § 1830; Georgia, Code, § 4003; Florida, §§ 1496, 1920; Tennessee, § 4024; Texas, art. 3621; Wyoming, § 2972; Colorado, Code Civ. Proc. § 298; Washington, Code Proc. § 584; California, Code Civ. Proc. § 764; Nevada, § 3299; Montana, Code Civ. Proc. § 388; Idaho, § 4571; Oregon, § 435; Dakota Territory, Prob. Code, §§ 285, 286.

²⁷² See chapter 4, § 28.

given to a procedure by publication against "unknown owners."²⁷³ The wives and husbands of the part owners, at least in all those states in which dower and courtesy as at common law still subsist, or in which the statute has given to husband and wife similar rights, inalienable without their consent, in each other's lands of inheritance, should be made parties to a suit in which at any stage of the proceeding a sale is sought in place of partition, as otherwise their interests would be lost to them. It makes little difference, however, whether their names are placed on the same side with their spouses or on the opposite side.²⁷⁴ In many of the states the statute expressly provides that the widow may assent to a sale free of dower, and take its estimated value out of the purchase money; and this course has been pursued by courts of equity ever since 1835 (when a table of values of life estates on the six per cent. basis appeared in the American Almanac), even where no express authority was given by statute. Whatever doubt there may be about the power of a probate court to sell in this fashion, there can be none about the power of a court of equity, if the dowress is a party to the suit; and even less doubt as to the good result to the parties in interest. But it seems that, in the absence of statute law, the life tenant is not entitled to a sum in gross as a matter of right.²⁷⁵ While in a true partition the owners of the first freehold and the trustees of the legal title represent all future or contingent interests the owners of which are bound by the lines of division adjudged between the former, in a proceeding which ends in a sale every person in being that has any interest must be made a party, or his interest will not be

²⁷³ See section on "Unknown Defendants." New York, Code Civ. Proc., § 1535. The guardian ad litem must be appointed by the court. *Wood v. Martin*, 66 Barb. 241.

²⁷⁴ *Rosekrans v. White*, 7 Lans. (N. Y.) 486. Dispensed with in Virginia. See Code, § 2564. The court to guard all interest in the proceeds.

²⁷⁵ See table in front of 3 Bush (Ky.), based on the Carlisle table of mortality, approved by court of appeals without aid of a statute, and Prof. Bowditch's tables of value of inchoate dower in *Lancaster v. Lancaster*, 78 Ky. 200, 202. The New York Code of Civil Procedure (section 1570) provides for estimating inchoate dower and other future interest on the principles of annuity; and so do statutes in several other states. *Contra, Ex parte Winstead*, 92 N. C. 703.

barred by the sale.²⁷⁶ Whether, however, a statute which directs such a sale among ordinary part owners applies when there are outstanding remainders, is an open question. It was held in New Jersey that before the amendment in the law which takes in the case of estates settled with remainders, a decree to sell for division was absolutely void against those in remainder, whether made parties or not (and such is still the law in North Carolina).²⁷⁷ It was held in Kentucky that where there are part owners of an indivisible lot, one of them cannot, by devising his share for life with remainders over, prevent his companions from having a sale for division without any regard to the terms and conditions on which settled estates are sold for reinvestment.²⁷⁸ The receipt and retention of the proceeds of sale by a part owner of full age and *sui juris* will operate as an estoppel, and shield the decree of sale against collateral attack.²⁷⁹

A nonresident, who is before the court by constructive service only, has the right common to defendants in like position to open the decree of sale for division within the statutory time; the question what effect such opening will have on the title of the purchaser being left for further consideration.²⁸⁰

§ 154. Common Features of License.

While it has been seen that in some states a petition stating the proper facts, and asking the sale for a definite purpose, is needful as the groundwork of jurisdiction, the license, which is a judgment, can nowhere be attacked collaterally because the facts on which it proceeds are not true (e. g. that there are no debts of the decedent);²⁸¹ nor can the sale be attacked for fraud in suggesting debts

²⁷⁶ Petition of Lyman, 11 R. I. 157; Collins v. Lofftus, 10 Leigh (Va.) 5 (ces-tui que trust not bound by decree of sale against trustee).

²⁷⁷ Stevens v. Enders, 13 N. J. Law, 271; Maxwell v. Goetschius, 40 N. J. Law, 383; Aydlett v. Pendleton, 111 N. C. 28, 16 S. E. 8.

²⁷⁸ Kean v. Tilford, 81 Ky. 600.

²⁷⁹ Jacobus v. Jacobus, 36 N. J. Eq. 248.

²⁸⁰ Welch v. Marks, 39 Minn. 481, 40 N. W. 611.

²⁸¹ Curran v. Kuby, 37 Minn. 330, 33 N. W. 907; Bowen v. Bond, 80 Ill. 351 (no debts to sell for); Gregory v. Lenning, 54 Md. 51 (on bill of review); (1160)

which did not exist, unless the purchaser can be connected with such fraud.²⁸² And if the court had jurisdiction to order the sale of the infant's or decedent's interest, its unauthorized meddling with other interests will not avoid that sale.²⁸³

In almost every state among provisions of the statutes for selling on account of the decedent's debts is a provision that a foreign administrator or executor may sell; that is, when the decedent dies domiciled in state or country A, and leaves lands in state B, the laws of the latter generally give to the foreign administrator or executor—that is, to the one appointed at the decedent's last home—the means of getting his license to sell the lands in such latter state, upon substantially the same terms as to a home administrator, only, however, when there is no administrator in the state containing the lands. The foreign representative must comply with some regulation, such as recording in the probate court of the county containing the land his foreign letters, in order to obtain recognition.²⁸⁴ The want of this step would render his license void, just as a license is a nullity, when granted to a man who claims to be, but is not, the home administrator.²⁸⁵ When the state law, as in Kentucky, forbids a nonresident to qualify or to act as personal representative, an ancillary administration would be the only remedy, though there might be some difficulty in obtaining letters in the absence of per-

Jackson v. Robinson, 4 Wend. 436 (no proof in the case, but note New York and old Kentucky decisions on want of reference or proper report for sale of infant's land); *Jackson v. Crawfords*, 12 Wend. 533; *Fitch v. Miller*, 20 Cal. 382; *Haynes v. Meeks*, Id. 288; *Lawson v. Moorman*, 85 Va. 880, 9 S. E. 150; *Pursley v. Hayes*, 22 Iowa, 11; *Castleman v. Relfe*, 50 Mo. 583; *Deans v. Wilcoxon*, 25 Fla. 980, 7 South. 163; *Ludlow v. Johnson*, 3 Ohio, 553.

²⁸² *Gordon v. Gordon*, 55 N. H. 399. No fraud or even impropriety to bargain for bids beforehand. *Palmer v. Garland's Committee*, 81 Va. 444; *Norman v. Olney*, 64 Mich. 553, 31 N. W. 555. See, for cases of collusion, *Loyd v. Malone*, 23 Ill. 43; *Winter v. Truax*, 87 Mich. 324, 49 N. W. 604. Arrangement for bid said to be against good policy. *Downing v. Peabody*, 56 Ga. 40.

²⁸³ *Fitch v. Miller*, *supra*.

²⁸⁴ E. g. Indiana, Rev. St. §§ 2363–2367; Kansas, par. 2929; Maryland, Pub. Gen. Laws, art. 93, §§ 195–203; Nebraska, §§ 1169–1172.

²⁸⁵ There seems to be no such provision in New York, and in its absence an ancillary administration must be had, also in Illinois, as in *Unknown Heirs v. Baker*, 23 Ill. 481. As to its difficulties see overruled case of *Thumb v. Gresham*, 2 Metc. (Ky.) 306.

sonalty.²⁸⁶ In like manner, and even more generally, provision is made for the guardians of nonresident children and the committees of lunatics living abroad to sell by license their lands; the condition being generally the filing and recording of a certified copy of the appointment, and either the giving of a new bond, or proof that these lands have been considered in fixing the penalty and approving the sureties in the guardian's bond at the domicile. In several states the recognition of this foreign guardian takes simply the form of a reappointment.²⁸⁷

Again, wherever the administrator can sell by license, a lien to secure the decedent's debts rests upon the descended or devised lands, for a term of years, which differs in the several states. It is in Massachusetts and Maine two years, in Michigan ordinarily four years and a half; in some states longer.²⁸⁸ An application for license is not to be made after the expiration of this time; but when it is made in time it overrides any conveyance or incumbrance made by the devisee or heir, in many states, though the grantee or incumbrancer be not made a party to the proceeding. The law may fix an order in which the several tracts are to be sold,—those remaining with the heir first, those which have been sold by him last; but, if necessary, every parcel must go; and the administrator may sell them for the debts of the estate, though the heir had disposed of them to purchasers in good faith before any application for license was filed.²⁸⁹ At common law this is otherwise. One who

²⁸⁶ *McAnulty v. McClay*, 16 Neb. 418, 20 N. W. 266.

²⁸⁷ New York, Code Proc. § 2349, allows any "other persons" to apply, though not to sell. See, as to foreign guardians, *Id.* §§ 2838–2841; Minnesota, c. 57, §§ 20–22; *Menage v. Jones*, 40 Minn. 254, 41 N. W. 972 (court of the situs has jurisdiction); Kentucky, *Shelby v. Harrison*, 84 Ky. 144; Indiana, Rev. St. §§ 2538–2541; Massachusetts, c. 140, § 9; Maine, c. 71; Connecticut, §§ 467–469; Michigan, St. § 6098; *Pfirrman v. Wattles*, 86 Mich. 254, 49 N. W. 40; Kansas, c. 46, § 22; Nebraska, §§ 1521–1524; Iowa, St. §§ 2266–2271; Missouri, § 5310, and generally following immediately upon the sections which regulate the actions of home guardians. See *Gronier v. Puymirol*, 19 Cal. 631; *Davis v. Hudson*, 29 Minn. 27, 11 N. W. 136. But such sales are void in Mississippi. *Musson v. Fall Back Planting & Mercantile Co.* (Miss.) 12 South. 589.

²⁸⁸ *Myers v. Pierce*, 86 Ga. 786, 12 S. E. 978 (mortgage by devisee); *Sidener v. Hawes*, 37 Ohio St. 532 (there was subrogation of the purchaser); *Stewart v. Mathews*, 19 Fla. 752.

²⁸⁹ *Farau v. Robinson*, 17 Ohio St. 242.

purchases in good faith from the heir before action brought by a creditor, or who in like manner buys from a devisee where the lands are not by the will charged with the payment of debts, is protected, the heir being liable, however, personally on the ancestor's bond to the extent of assets taken by descent, and the devisee in like manner, under the statute of fraudulent devises.²⁹⁰ In New Jersey, Virginia, and West Virginia this principle is so far modified by the words of a statute that before alienation of lands the heir or devisee can be sued by the ancestor's or testator's creditors only in equity by a suit to subject the lands; after alienation the land is discharged from the debts, the heir or devisee becoming answerable for the proceeds of sale.²⁹¹

Again, all sales by license rest on a record. Though the courts have differed widely from great strictness to the wildest looseness as to the keeping of the record, and the mode of proving it on collateral attack,—these records seem to have been kept very loosely in Pennsylvania and in the early days of Ohio and of Michigan,—the judgment itself that authorizes the sale must have been actually entered upon some journal or order book of the proper court, or of the surrogate, ordinary, or probate judge.²⁹² And it may here be stated that the license given to the guardian by the court of his domicile to sell the ward's lands in another state is always treated by the latter as absolutely void, just like any other judgment which purports to act upon land outside of the jurisdiction.²⁹³ The proof of the record is generally upon the party that claims under the sale by license.²⁹⁴ The supreme court of the United States has gone fur-

²⁹⁰ Co. Litt. 191a, 376b. From the forms of declaration and of the plea
rien per descent in a suit against the heir or devisee, on the bond of the
ancestors, in the second and third volumes of Chitty's Pleadings, it can be
seen that the only question was that of personal responsibility. See, also,
Ryan v. McLeod, 32 Grat. (Va.) 367; *Bedell v. Lewis*, 4 J. J. Marsh. (Ky.) 562.

²⁹¹ Virginia, Code, § 2666; West Virginia, c. 86, § 5; New Jersey, "Heirs and
Devises," 1, 2.

²⁹² Newcomb's Lessee v. Smith, 5 Ohio, 447. As to looseness of records, see
McPherson v. Cunliff, 11 Serg. & R. 422, Davis' Appeal, 14 Pa. St. 371; and
some of the Michigan cases in section 150.

²⁹³ *Salmond v. Price*, 13 Ohio, 368; *Blake v. Davis*, 20 Ohio, 231; *Price v. Johnston*, 1 Ohio St. 390.

²⁹⁴ *Wells v. Chaffin*, 60 Ga. 677 (orders signed by probate judge on loose

ther than almost any other court in the country in being satisfied with a very incomplete record; and not only presuming that the other parts have in the lapse of time been lost, but also in deeming unessential some steps which the record clearly shows could not have been taken at all, although they are clearly prescribed by the statute governing the proceedings. The leading case of this class was decided in 1842, and grew out of a sale by license made in 1826, in the then territory of Michigan, long before the clause was introduced into the law of the state, which, in favor of a purchaser in good faith, cures all defects in the steps preceding the license. The supreme court said: "On a proceeding to sell the real estate of an indebted estate there are no adversary parties. The proceeding is in rem. The administrator represents the land. They are analogous to the proceeding in admiralty, where the only question of jurisdiction is the power of the court over the thing, without regard to the parties who may have an interest in it. All the world are parties. In the orphans' court * * * their action operates on the estate, not on the heirs of the estate. A purchaser claims not their title, but one paramount."²⁹⁵ This doctrine was affirmed by the supreme court in two cases in which the collateral attack was

papers, and not entered till after sale not a record). A partial record was admitted in *Guilford v. Love*, 49 Tex. 715 (conveyance by administrator on decedent's bond), against the objection that the rest of the record might defeat the judgment. "Of course, these things must be established by the best evidence, and by the record, where the record exists and can be obtained. If the record or original papers have been lost or destroyed, the contents may be given in evidence as in other cases." *Blanchard v. De Graff*, 60 Mich. 107, 26 N. W. 849.

²⁹⁵ *Grignon's Lessee v. Astor*, 2 How. 319. The opinion had little, if any, support in decided cases, except from Pennsylvania; in fact, hardly any but *McPherson v. Cunliff*, 11 Serg. & R. 422, which might have been decided otherwise but for the disgraceful attitude of the plaintiff. The decedent's lands had been sold by the administrators under the belief that the plaintiff and his sister were the heirs. Long afterwards, and when the lands had much risen in value, the plaintiff discovered that he was a bastard, hunted up the heirs-at-law, and bought their title, claiming that they, not having been made defendants, were not bound by the license and sale under it. In the case before the supreme court, the record showed pretty plainly that the notice required by the then law of Michigan had not been given, and, if the proceeding for license had been considered like an administration suit, the license and sale under it must have been held utterly void.

without any merit;²⁹⁶ but at last the court took the bold step of enforcing it in a case coming from Wisconsin, by holding in favor of one purchaser a license to be good and valid which the supreme court of the state had, by reason of too short a publication, declared void as against another purchaser under it.²⁹⁷ The short limitation (generally five years) by which many of the states protect the purchaser at a void sale made under license might be also discussed here as one of the common features, but it is complicated by savings for disabilities and by adverse possession, and must therefore be discussed under the general head of "Limitations." Though the statutes generally speak of "five years from the sale," the courts look on them as statutes of limitation barring the action after it has accrued,—that is, after the purchaser has taken possession under the void sale,—as it would be absurd to let his title mature, while the heir or ward remains in possession, perhaps for the very reason that the sale was notoriously unlawful.²⁹⁸

Wherever the proceeding for license is not considered as altogether *in rem*, and wherever parties defendant and the service of notice is required, it would follow that children begotten, but unborn, when the application for license or decree is made, and who by their birth take a portion of the estate theretofore held by other parties, are in no way concluded by the license or decree of sale, or anything done under it.²⁹⁹

²⁹⁶ *Beauregard v. New Orleans*, 18 How. 497; *Comstock v. Crawford*, 3 Wall. 396. In both cases the irregularities were slight, and there was a long lapse of time. Also, *Gager v. Henry*, 5 Sawy. 237, Fed. Cas. No. 5,172. *Voorhees v. Jackson*, 10 Pet. 449, is still approvingly quoted in these cases.

²⁹⁷ *Mohr v. Manierre*, 101 U. S. 417, in conflict with *Mohr v. Tulip*, 40 Wis. 66; but the supreme court of Wisconsin, in *Mohr v. Porter*, 51 Wis. 487, 8 N. W. 364, receded from its former position, and came into accord with the supreme court of the United States. The position taken by the supreme court of the United States is somewhat similar to that taken in the well-known case of *Gelpcke v. City of Dubuque*, 1 Wall. 175, 220, 221, treating a line of decisions somewhat like a contract between the state and those who part with their money on the strength of it. The contract must not be broken by declaring that to be void which had been held out as valid. The older Ohio and some Alabama cases also fall in with the doctrine held by the United States supreme court.

²⁹⁸ *Toll v. Wright*, 37 Mich. 93. The court argues that under any other light the five-years act would be unconstitutional.

²⁹⁹ *Massie v. Hiatt's Adm'r*, 82 Ky. 314.

§ 155. Partition in Kind.

Where partition in kind is made, either by writ of partition or by bill in equity,³⁰⁰ in a court of general jurisdiction, and when dower is allotted by metes and bounds in a writ of dower or suit in equity, the judgment and decree are generally good against collateral attack, if made by the court of the situs of the land, and the parties are notified, as in other civil actions or suits in equity; while the jurisdiction of the probate courts in these matters is more limited, and therefore more easily overstepped. Lawmakers have, however, been taught by experience to draw their statutes in broader terms, even when they confer powers over the freehold on inferior, and often unlearned, courts.³⁰¹

The jurisdiction of the superior courts did not always cover all cases; and it was held at one time in Pennsylvania that the orphans' court alone has jurisdiction among coheirs, exclusive of a writ of partition, in the common pleas, unless there is a contest as to the shares; but, for a long time, in this and other states, the jurisdiction of the orphans' or probate courts has been concurrent with that

³⁰⁰ The extent of equity jurisdiction is treated in *Agar v. Fairfax*, 17 Ves. 543, 2 White & T. Lead. Cas. Eq. 449; *Mitf. Pl.* 120; *Story, Eq. Jur.* § 650 et seq. In *Patton v. Wagner*, 19 Ark. 233, the regulating statute was held not to exclude the remedy in equity. In Kentucky such is the common understanding. Partition in equity may be made among remainder-men, though the life tenant objects. *Phillips v. Johnson*, 14 B. Mon. 175.

³⁰¹ The writer has in his Kentucky Jurisprudence (section 77) illustrated the dangers besetting "divisions" in the county court under the Kentucky statutes before 1854, when the proceedings were first assimilated to civil actions. Thus, in *Short v. Clay*, 1 A. K. Marsh. 371, a division was held void because the act authorizing it applied only when some of the owners are nonresidents, and this did not appear; in *Clay v. Moseley*, Id. 361, because there was no written contract; in *Guyton v. Shane*, 7 Dana, 498, because there had been no demand and refusal to make partition; in *Gaithers v. Brown*, 7 B. Mon. 91, under an act authorizing division among parcelers, because the holding by parcerancy had been broken by a conveyance; in *Newby v. Perkins*, 1 Dana, 440, because the notice was proved by a sheriff's return instead of affidavit. Similar niceties were applied in some of the other states. The present Kentucky Code of Practice (section 499) leaves no room for any such quibbles. In Ohio, since 1880, partition is made a civil action. See *Stone v. Doster*, 7 Ohio Cir. Ct. R. 8.

of the higher courts.³⁰² As neither the writ of partition at common law, nor a bill in equity, give an opportunity to try a question of title by jury, it was the old rule, in both kinds of proceedings, to stop short, or even to throw the defendant or complainant out of court, whenever it appeared that he was out of possession and that the other parties held the land adversely to him. He had, first, in an ejectment or real action, to recover his undivided share of the land, before he could ask partition. This very sound doctrine has in some states been overturned by the encroachments of the courts of equity. In New York, the statute has simply provided for trial by jury, in proceedings for partition, when the defendant holds or claims adversely, or when the title to the whole or to any share is otherwise in dispute.³⁰³ But it may be safely asserted that, at the present day, the judgment of any court having general jurisdiction in law or equity, awarding and confirming a partition in kind, would not be held void, though the court had improperly undertaken to decide a dispute as to the title between the parties against a defendant claiming to be in full and adverse possession. However, in the states in which the distinction between law and equity is strictly kept up (as in the federal courts), the judgment of a court of law, as well as the judgment of a probate court, might be held not to conclude trusts or equities between the parties which could not have been pleaded or set up.³⁰⁴

³⁰² Act of 1846, Pennsylvania, Brightly, Purd. Dig. "Partition." 4.

³⁰³ See, for history of doctrine, Weston v. Stoddard, 137 N. Y. 119, 33 N. E. 62 (section 1546, Code Civ. Proc.); Gore v. Dickinson, 98 Ala. 363, 11 South. 743 (under statute Alabama, § 3262, extending equity jurisdiction); Claughton v. Claughton, 70 Miss. 384, 12 South. 340 (like statute). As to extent of equity jurisdiction, Gay v. Parpart, 106 U. S. 679, 690, 1 Sup. Ct. 456; Deery v. McClintock, 31 Wis. 195 (legal dispute as to title not to be tried in partition suit, which is a suit in equity).

³⁰⁴ So by statute in New York, Michigan, etc. (See places below in note 309.) Also, Bollo v. Navarro, 33 Cal. 459 (title may be tried); Ormond v. Martin, 37 Ala. 598 (since 1858); Griffin v. Griffin, 33 Ga. 107 (Act of 1767); Godfrey v. Godfrey, 17 Ind. 6. As to equities, see Hardy v. Summers, 10 Gill & J. 316 (the county court in Maryland being a court of general jurisdiction; probably not law now). Partition may be made in the United States circuit court, if the citizenship of the parties justifies it; and here the distinction between law and equity is strictly enforced. As to claimants out of possession not having the right to sue in partition, the decisions found are

On the other hand, a probate court, whatever name it bears, has a limited jurisdiction; and it could formerly only allot parts out of a tract or tracts confessedly held jointly by the parties, but had no jurisdiction to adjudge the ownership of land, either at law or in equity. In Pennsylvania, the course has been for a defendant in possession who does not admit the allegations as to joint ownership of the applicant to the orphans' court to refuse becoming a party to the partition proceeding until the title is determined by an ejectment; but, if he allows the partition to proceed, he is as much bound by the final result as if it had been reached on a writ of partition in the common pleas. In other states, where a probate court which cannot adjudge title or possession in an ejectment or writ of entry, nor decree enjoyment under a trust, divides lands, it has been held, at least in the older cases, that unless the statute expressly provides otherwise, the ownership or extent of the shares is not unalterably fixed; but the court only adjudges what boundaries answer to a named aliquot share; and, if the shares thereafter turn out to be greater or less, or to be otherwise owned, the order confirming the division does not estop the parties when they come before a tribunal with full powers over the title and possession of land.³⁰⁵ It will be

mainly in the direct proceeding (e. g. Hoffman v. Beard, 22 Mich. 59; McMasters v. Carothers, 1 Pa. St. 324); not by way of collateral attack. The Tennessee cases, winding up with Whillock v. Hale, 10 Humph. 65, deny jurisdiction for equity when the title is disputed unless the objection be waived. Hence the decree cannot be void. Luntz v. Greve, 102 Ind. 173, 26 N. E. 128 ("title may be put in issue by appropriate pleadings, and, when the parties thus put it in issue, the decision is decisive, as in any other case"), which is supported by older Indiana cases there quoted, and by Rev. St. § 1071.

³⁰⁵ Mehaffy v. Dobbs, 9 Watts, 363; Herr v. Herr, 5 Pa. St. 428; In re Eell's Estate, 6 Pa. St. 457. Contra, Den d. Richman v. Baldwin, 21 N. J. Law, 395; Richardson v. City of Cambridge, 2 Allen, 118; and equities are not barred, Williams v. Van Tuyl, 2 Ohio St. 336; Greenup v. Sewell, 18 Ill. 53; Wilbridge v. Case, 2 Ind. 36 (summary partition is a suit at law, not in equity); Louvalle v. Menard, 1 Gilman, 39. None of these cases were decided under statutes now in force. It was also held in some of the older cases, as Pickering v. Pickering, 21 N. H. 537, that a mere dispute raised by the defendant as to the share alleged by the petitioner, without any apparent foundation, was enough to oust the probate court of jurisdiction, but the later cases, as Dearborn v. Preston, 7 Allen, 192, and Phillips v. Perry, 49 N. H. 264, note, overrule this position; and the modern statutes are not so worded as to give

seen, in the note on the jurisdiction of courts, that many of the Western states, under the lead of Michigan, have made the judgments of the probate courts conclusive on all questions and on all parties (subject to appeal); and many other states have wisely confined the power of dividing land to the superior courts alone.

In many states, as we have seen in treating of "sale for division," the probate court has jurisdiction only as between coheirs and joint devisees and those claiming under them, while the administration of the estate which the heirs or devisees claim is "open"; and it is so, also, with partition in kind. The jurisdiction of these courts has been sustained, without regard to lapse of time, when there had been no formal closing of the estate or succession.³⁰⁶ In Virginia the jurisdiction is given, by the present Code, to the circuit or "corporation" (i. e. city or borough) court of the county or corporation in which the land is situated.³⁰⁷

As a rule, one who is not a party to a suit for partition, or who is under disability, and is made a party, but is not proceeded against as the law prescribes as to persons under such disability, is not bound by the result of the petition, subject, however, to the exceptions hereafter stated; but an appearance or assent by guardian at almost any time is deemed a cure.³⁰⁸

We subjoin in a note the provisions in the several states as to

rise to any such construction. However, the dismissal for want of jurisdiction in *Dean v. Snelling*, 2 Heisk. 486, of a partition suit in the county court, where the title was disputed, looks as if the decree might have been held void on collateral attack.

³⁰⁶ *Branch v. Hanrick*, 70 Tex. 731, 8 S. W. 539 (under articles 1802, 1829, Rev. St.); *Robinson v. Fair*, 128 U. S. 53, 9 Sup. Ct. 30 (under Code of Procedure of California); *Merklein v. Trapnell*, 34 Pa. St. 42 (after lapse of 26 years); *Earl v. Rowe*, 35 Me. 414 (in Maine the jurisdiction remains, though the estate be settled).

³⁰⁷ *Virginia, Code*, § 2562. The decree by itself gives title. *Id.* § 2565.

³⁰⁸ *Seamster v. Blackstock*, 83 Va. 232, 2 S. E. 36; *Sock v. Suba*, 31 Neb. 228, 47 N. W. 859 (equitable owner in possession must be made party); *Prince v. Clark*, 81 Mich. 168, 45 N. W. 663 (infant not otherwise served, where guardian plaintiff, partition set aside). In *Kentucky Union Land Co. v. Elliott (Ky.)* 15 S. W. 518, the guardian of children not served was allowed to assent to the partition for them. In California, under Code Civ. Proc. § 754, no one is a necessary party unless his title is on record. See, contra (partition not binding), *Mellon v. Reed*, 114 Pa. St. 647, 8 Atl. 227.

jurisdiction over the partition of land. It will be seen that the superior courts of law and equity have jurisdiction in all the states to divide lands. The probate courts in a few states have no such jurisdiction at all; in a number of states, only among coheirs or joint devisees, and those claiming under such coheirs or joint devisees; and this, again, in some states, only as long as the administration is not closed.³⁰⁹ Again, as to the choice of the local court,

³⁰⁹ The references to county, probate, or orphans' court are understood in addition to jurisdiction among the superior courts; at least, where the lands to be divided are no longer part of a decedent's estate. Maine, c. 88, by supreme court; c. 65, § 8, by probate court "having jurisdiction" of estate. Massachusetts, c. 178, §§ 1-44, by supreme court; §§ 45-63, by probate court in which the estate is being or has been settled. In both states as between heirs, devisees, and those claiming under them. New Hampshire, c. 197, "the judge"—i. e. the probate court of the last domicile—makes division among dowress, heirs, and devisees. Rhode Island, c. 187, §§ 11, 21, only among heirs. Connecticut, § 635, "the" probate court divides lands, through "distributors," among heirs and devisees. Vermont, §§ 2252-2267, "the" probate court makes partition among heirs and devisees and their grantees. New York, Code Civ. Proc. §§ 1532-1595 (which embraces sale for division), only in the superior courts, and all parties can be concluded; an infant to sue only by leave of the surrogate. New Jersey, "Partition," the orphans' court (when land lies in two or more counties, the prerogative court) may divide land, when an infant is part owner. Pennsylvania, "Partition," orphans' court and common pleas; if land in several counties, the orphans' court of last domicile. Ohio, § 5756, only the common pleas. In Indiana there is no inferior court. Michigan, §§ 5963-5980, probate court may make partition among heirs and devisees, including advancements; all parties bound; Wisconsin, §§ 3101-3153; Kentucky, Code Prac. § 499, gives circuit and county court concurrent powers, aside of partitions in equity; by section 66, court of county of last residence may divide between heirs and devisees. Tennessee, § 3997, circuit, chancery, or county court. See, as to two latter, notes 303 and 305. Alabama, § 787, subds. 9, 10, allotment of dower and partition of land in county court. Mississippi, §§ 3097, 3099, partition only in chancery court, conducted like other suits. Iowa, § 3277, only in equity. Minnesota, c. 56, §§ 6, 9, the probate court in charge of estate may divide among heirs, devisees, and their assignees. Kansas, §§ 4125, 4126, 4717, et seq., only in the district court of the county in which the land, or part of it, lies. Nebraska, §§ 1347-1353, county or probate court makes partition among heirs and devisees, which is conclusive "upon all persons interested." California, Code Civ. Proc. § 755, action in the superior court of the situs only. Montana, §§ 26, 380, the district court of county where land or any part of it lies. Delaware, c. 86, only by writ in the superior court or in chancery. Maryland, art. 16, § 117; Id., art.

it will be found that those states in which the "administrator's license" is most in vogue confer the jurisdiction to divide the descended or devised lands on the court of the county in which the administration had been granted, or the will proved (and this is also the case in Kentucky, where the license is unknown).³¹⁰

Under the old equity practice, when a partition in equity could be carried out only by personal decree against the parties, compelling them to make deeds to each other, those in remainder, or holding executory devises, or other future or uncertain estates, could not be reached at all; and courts of equity settled down to a certain impotence in this respect. Since, however, these courts now make their deeds by commissioner, and, in a few states, their decree of partition passes the title, under the statute, by its own vigor, without the aid of deeds, this defect has been gradually remedied, and in some states (as in Kentucky) the partition "by families,"—that is, sets of life tenants, each with his own remainder-men, has been expressly authorized.³¹¹ One who holds a right of way under one

46, § 32, only in circuit or chancery court. Virginia, § 2562; West Virginia, c. 79, §§ 1, 3,—circuit (or corporation) court in equity; no distinction between tenants in common and coheirs. South Carolina, § 1830, but under section 792 the master makes orders in vacation. Georgia, partition is had only in the superior courts,—section 3183 et seq. in equity; section 3996 at law. Missouri, § 7133, only in the circuit court, if land lies in several counties, of that where most parties reside; if there is none such, of that containing greater part of the land. Arkansas, § 4789, in the circuit court only. Colorado, in the district court only (Code Civ. Proc. § 26) of county where land lies; if land in several counties, of that containing greater part; otherwise in any of the counties.

³¹⁰ E. g. Ohio, Rev. St. § 5755 ("when the estate is situate in one county, the proceedings shall be had in that county; and when situated in two or more counties, the proceedings may be had in any county wherein a part of such estate is situate").

³¹¹ See distinction taken in the cases already quoted in section on "Sale for Division." Stevens v. Enders, 13 N. J. Law, 271; Maxwell v. Goetschius, 40 N. J. Law, 383; also Tilton v. Vail, 53 Hun, 324, 6 N. Y. Supp. 146 (tenant by courtesy of a share may sue); Clarke v. Cordis, 4 Allen, 466 (holders of contingent future estates not parties. Formerly private acts for this purpose used to mention the parties to be named. See Legget v. Hunter, 19 N. Y. 446; Williamson v. Berry, 8 How. 495. In Kentucky (Sess. Acts 1885-86; Carroll's Code, p. 245) the statute provides for thus making partition in equity among families; that is, one purpart to A. for life, remainder to his children, another to B. with like remainder, etc. Nearly all the modern

of the cotenants (such as a railroad company) is not a necessary, though he may be a proper, party to a partition;³¹² and it is so with the holders of commons or other easements upon the whole estate, who need not be made parties, because the division of land in severalty will not diminish or affect their rights; and this is even clearer with those who hold liens for money on the whole estate.³¹³ In New York, and in several other states, a guardian or committee can, by summary application to the surrogate or probate judge, get the power to consent on behalf of his ward to a partition in pais, where the latter is joint owner of land with others; while in Wisconsin such power is inherent to the office of guardian, and need not be specially granted.³¹⁴

After the court has declared the shares and the right to a division, the work of laying off the land into "lots" is done by a sheriff's jury, or by appointees of the court, known as "commissioners," as "referees," or as "distributors," who report a division and plat, with or without owelty of partition to correct the inequality of the lots. The court then gives its judgment approving the division, or it may reject it, and recommit the work to the same or other hands. At law this judgment by itself vests the title in severalty; but in equity the decree confirming the report orders deeds to be executed in accordance therewith, either by the parties or by the court's commission-

statutes in the West make similar provisions, while that of Pennsylvania ("Partition," 30) looks to the vested remainder-man as the principal party. In New York, under the Code of Procedure (section 1538), all remainder-men and reversions in being must be parties.

³¹² Weston v. Foster, 7 Metc. (Mass.) 297; Charleston, C. & C. R. Co. v. Leech, 35 S. C. 146, 14 S. E. 730.

³¹³ Diermond v. Robinson, 2 Yeates (Pa.) 324 (judgment lien); Lloyd v. Conover, 25 N. J. Law, 47; Kline v. McGuckin, 24 N. J. Eq. 411; Manufacturers' & Mechanics' Bank v. Bank of Pennsylvania, 7 Watts & S. 335. The more so as against purchaser pending suit. Hart v. Steedman, 98 Mo. 452, 11 S. W. 993; Parts remain subject to easement. Hazard v. Little, 9 Allen, 260, following the leading case of Agar v. Fairfax, *supra*. Execution levy on share transferred to purpart. Campau v. Godfrey, 18 Mich. 27. As to inchoate dower, the old forms in writs of partition in which the wives are not made parties are sufficient. And see Tennessee Code, § 3994. In Massachusetts, c. 178, § 38, those not parties to the proceeding are not bound. But lien holders, under section 44, are.

³¹⁴ New York, Code Civ. Proc. §§ 1592, 1593; Wisconsin, St. § 3984.

er; always by the latter when some of the parties are under disability.³¹⁵ Formerly, when courts of equity acted only in personam, and did not act upon the title through a commissioner's deed, their decrees of partition would not be final against an infant until he came of age (while now he cannot open such a decree except for error appearing of record); and the partition made in chancery was of no avail against unborn or unascertained remainder-men, from whom no deed could be obtained; but the commissioner's deed now in vogue acts on the estate like a judgment on the writ at law.³¹⁶

Proceedings in the orphans' or probate court are deemed to be "law," not equity; and the laws conferring the power of partition on probate courts are silent as to any execution of partition deeds, and thus imply that the record of partition is sufficient in itself.³¹⁷ It often happens that after a partition by commissioners the several owners take possession of the tracts allotted to them, and do not trouble themselves any further about the order of approval, which is their muniment of title. The law is very lenient in waiving or supplying the judgment of approval when time enough has elapsed to show that all parties were really satisfied with the allotment.³¹⁸ And whatever aid is given by the courts to defective partitions in pais, by which, for instance, upon a redivision, the improvements made by a part owner or his grantee will be thrown into his new allotment, will also be extended to those who hold under a partition made by a court, which, on some flaw in the jurisdiction, is not valid and binding.³¹⁹ Generally speaking, the courts are much more liberal in upholding partitions in kind, in which no very great injustice can well be done to any of the parties, especially when some of the purparts have gone into the hands of innocent purchasers, and have

³¹⁵ In Georgia (section 3184) and Virginia (section 2565) a decree in equity works on the title without deed. See, as to the distinction, Story, Eq. Jur. § 652, quoting Whaley v. Dawson, 2 Schoales & L. 371.

³¹⁶ Story, *ubi supra*, and notes.

³¹⁷ E. g. Connecticut, Gen. St. § 635, winds up, "Such distribution when accepted by the court, shall be valid."

³¹⁸ Caudill v. Caudill (Ky.) 7 S. W. 545.

³¹⁹ Varnum v. Abbot, 12 Mass. 474; McKee v. Barley, 11 Grat. (Va.) 340; Johnson v. Stevens, 7 Cush. 431; Holcomb v. Coryell, 11 N. J. Eq. 548; Challefoux v. Ducharme, 4 Wis. 554; Robinett v. Preston, 2 Rob. (Va.) 278.

been improved, than sales for division, by which the estates of minors are so often wholly swept away.³²⁰

Wherever the statute regulates partition in kind, especially where it confers the power upon probate courts to divide lands among heirs and devisees, the allotment in dower is nearly always included, excepting, of course, those states in which dower has been abolished; and the validity of such allotment rests on the same ground as the division of shares among the coparceners or tenants in common.³²¹

The courts of many states have undertaken, sometimes in obedience to a statute, to include in a partition among coheirs or codevisees lands lying out of their own state boundaries. Of course, neither the judgment of the court nor a commissioner's deed made in execution thereof can affect the title to land beyond the limits of the sovereignty. But if the court orders the parties to make deeds of partition, and they, being capable of acting, do execute such deeds, there is no reason why such instruments should not operate with like effect as if they had been executed without the previous command of the court.³²² And if the parties to whom the home lands are allotted take possession, and by deed or record accept the allotment, they would, it seems, be barred by estoppel from claiming any share in lands outside.³²³ In that most frequent partition in kind, the allotment of dower, whether by common law, equity, or probate court, the judgment or decree of the court affirming the commissioners', auditors', or referees' report is hardly ever executed by a commissioner's deed, but works out a legal life estate in the widow in severalty by its own force.³²⁴

³²⁰ *Sharp v. Pratt*, 15 Wend. 610; *Cole v. Hall*, 2 Hill (N. Y.) 625 (both after partitions adjudged against unknown owners).

³²¹ *Neeld's Appeal*, 70 Pa. St. 113.

³²² *Penn v. Lord Baltimore*, 2 White & T. Lead. Cas. Eq. 1806.

³²³ *Winner v. Winner*, 82 Va. 890, 5 S. E. 536, refers to the authorities. It is not a case of collateral attack, but the original suit in which partition of lands partly in Virginia, partly in West Virginia, was refused. *Muller v. Dows*, 94 U. S. 444.

³²⁴ E. g. *Illinois, Rev. St. c. 41*, § 38.

§ 156. Sale of Settled Estates.

Closely akin to the judicial sale of lands of infants and lunatics for their own benefit are the provisions for selling lands settled by deed or will in successive estates, with a view to reinvestment, or for the purpose of discharging liens and reinvesting the residue. The life tenant, or holder of a present defeasible fee, is often burdened with unimproved lots, or dilapidated buildings, yielding no revenue at all, or not enough to pay taxes, not to speak of repairs. Such property often becomes an eyesore to the neighborhood, sometimes a moral and material plague spot to the community. But the remainder-men are generally infants, or they may be uncertain, or unborn; and there ought to be a power to put such property in the hands of a single owner, who can improve it and make it useful, while the money raised upon the sale thereof is invested in other lands or securities that pay an income proportionate to their cost. Very drastic measures with that end have been passed by the British parliament in 1882 and 1883;³²⁵ while but few of the American states have acted in the matter, and these in a cautious and somewhat half-hearted way, directing that the sale by order of court shall not take place when expressly forbidden by the will (or by the deed or will) under which the land is held; an exception which disavows the only true ground on which such statutes can rest, namely, that the holding of settled estates by persons and families unable to repair or improve them is opposed to the public good.³²⁶

Kentucky and Tennessee, states in which strict settlements by deed or will are but too frequent, have felt most need for the remedy, and applied it at a comparatively early date, and with great elaboration. The principal section of the Kentucky law is drawn so concisely that its tenor is the shortest way of rendering it: "In

³²⁵ Settled Land (England) Act 1882 and Agricultural Holdings (England) Act 1883, are fully explained in 1 Lewin, Trusts (8th Ed.) 550-571.

³²⁶ So in Kentucky, Code Prac. § 492, subd. 1; Michigan, Supp. § 6024i; Tennessee, Code, § 4071. But in the former state (*supra*, note 278), where one part owner ties up his share with such a prohibition he cannot thereby prevent a decree for selling the whole tract as indivisible. A direction in the will that lands shall be equally divided between certain persons is no such prohibition. *Hawkins v. Engand*, 3 Head (Tenn.) 652.

an equitable action by the owner of a particular estate of freehold in possession, or by his guardian or committee if he be an infant or of unsound mind, against the owner of the reversion or remainder, though he be an infant or of unsound mind; and against the owner of the particular estate, if he be an infant or of unsound mind; or, if the remainder be contingent, against the person, if in being, in whom it would have vested, if the contingency had happened before commencement of the action, though he be an infant or of unsound mind; and against the owner of the particular estate, if he be an infant or of unsound mind,—real property may be sold for investment in other real property.” As this section reaches only life estates followed by reversions or remainders, recourse must be had, where the land is held in defeasible fee, followed by an executory devise, to the provisions of an older law, which, it has been held, is still in force as to this case, otherwise not provided for.³²⁷

* It has been held that, as far as such a law undertakes to sell the remainder or reversion of an adult of sound mind against his will, it is unconstitutional. Otherwise, and when the proceedings fully comply with the law, the purchaser will have a good title, not only against all parties to the action, but also against unborn remaindermen. The provisions as to the bond which must precede the decree are the same as where the sale of the land of infants is ordered. They have been since supplanted by a provision for paying the proceeds of sale into court; and the court makes the reinvestment.³²⁸

³²⁷ Kentucky, Code Prac. § 491 (1876). The older law is chapter 63, art. 6, Gen. St. 1873, in force for this purpose. *Newman v. Ecton* (Ky.) 21 S. W. 526. A Kentucky act of 1882 relates only to estates held in trust by one person for the benefit of another person for life, with remainder to “a class,” or to persons not to be ascertained until the death of the life tenant, or with a power of devise in him. The circuit court may, in an action to which all persons in interest are parties, on proper averment and proof, authorize the trustee to sell or mortgage the fee, the proceeds to be paid into court for reinvestment, his deed to bind all persons in interest, present or in future. It is doubtful whether such a case is reached by section 491. The act of 1882, it is seen, saves the costs of a commissioner’s sale.

³²⁸ *Gossom v. McFerran*, 79 Ky. 236. An adult has the right to deal with his own for himself, and may object to a sale, though the law deems it to be for his benefit as much as for that of life tenant. But would not such a law be constitutionally valid, when applied to settlements by deed or devise made subsequent to its passage? As to investment by court, see Acts 1891-93 (Code Amendment) p. 58, c. 37, § 1, subsec. 5.

The Tennessee Code approaches the problem from another side. The chapter "on the sale of property of persons under disability" first gives to the court of chancery, either of the county in which the land lies, or in which a party under disability resides, the power to consent to the sale of land on behalf of those who are under the disability of coverture or infancy, whether the interest of such persons or of "any of the parties litigant" be in possession, reversion, or remainder, or subject to any limitation, restriction, or contingency; and it afterwards adds that property so limited that persons not in being may have an estate or interest therein may also be sold, if all those interested then in being are brought before the court. It is needless, for our purpose, to discuss what facts must, under the law, be proved, that a sale may be decreed; for, if the law is otherwise complied with, "the purchaser will get a good title, although the court may have erred in its conclusions from the facts, and the decree may afterwards be reversed" for error. The court itself sees to the reinvestment.³²⁹ The law has been applied where the remainder-men in being, whether the remainder be vested or contingent, were of the same class as those who might be born thereafter: for instance, under a settlement to A for life, remainder to such children and descendants of dead children as he might have at his death, one child and one grandchild living at the time of suit brought would represent those unborn. But it is not clear, and it has not been held, that the law reaches only such cases. And there is a deep-seated conviction that aside of and in spite of the statute the chancery courts have in many cases the power to deal with the "whole estate," and, in order to do so, disregard the prohibition of the will or deed of settlement, by bringing all the parties then in being before the court.³³⁰

³²⁹ Tennessee, Code, §§ 4054, 4057, 4058, 4067-4069.

³³⁰ Gray v. Barnard, 1 Tenn. Ch. 298.

"There seems to be some misapprehension in regard to the inherent power of a court of equity over the 'whole estate' in land, where all the parties are not or cannot be brought before the court. Lord Redesdale said in Giffard v. Hort, 1 Schoales & L. 408, that 'it is sufficient, as courts of equity have determined on grounds of high expediency, to bring before the court the first person entitled to the inheritance, and, if no such person, then the tenant for life.' Lord Eldon places the doctrine on the ground of necessity, and 'by analogy to the law, according to which there is no doubt, by a recovery

In Michigan a similar law was enacted in 1887. It applies only to "lands devised for life with power of appointment by will, or in trust without power of sale." Jurisdiction to order a sale is given to the circuit court, sitting in chancery, upon a petition setting forth a description of the lands, the names, residences, and interests of all the parties interested, and praying that the proceeds be treated as real estate. The court enters an order of publication, a copy of which is published once a week for three weeks in a newspaper. The sale, when ordered, is to be made by the petitioner, after having given bond. The proceeds remain a lien upon the land sold till invested by the court. The deed, when made, under the decree, conveys the whole fee.³³²

We have seen that in New York, as in Tennessee, the sale of remainder interests belonging to infants may be decreed; but the statute seems not in direct words to affect the rights of those not in being, and thus to provide for the sale of the whole estate.

Statutes like those of Kentucky, Tennessee, and Michigan give means of selling in addition to that under a "power"; and when these statutes, or those regulating the judicial sale of infant's lands, disallow a sale forbidden by the deed or will, a restriction upon the trustees', executors', or life tenants' power of sale, in either time or method, does not stand in the way of the court ordering a sale under the statute.³³³

In Massachusetts, the supreme court, or the probate court of the county in which the land is situate, may entertain the petition of one who has an estate in possession for the sale of land "subject

in which a subsequent remainder-man is vouched without prejudice to the intermediate remainder, you may bar all remainders behind.' See *Lloyd v. Johnes*, 9 Ves. 37, where he discusses the subject, and shows the importance of the rule to the remainder-man himself, as entitling him to the benefit of a suit instituted by the party having the first vested estate of inheritance. This doctrine applies equally to suits by and against the estate; to a suit to foreclose a mortgage (*supra*); to settle the terms of a trust or executory settlement (next case); to stay waste; to have partition of lands (*Gaskell v. Gaskell*, 6 Sim. 643); and, in fine, to all cases of every nature and character involving the whole estate." The payment of money into court is imperative, as the court cannot otherwise reinvest it. *Mason v. Tinsley*, 1 Tenn. Ch. 154.

³³² Mich. Supp. (3d Vol.) §§ 6024a-6024i.

³³³ *Lindemeier v. Lindemeier*, 91 Ky. 264, 15 S. W. 524.

to a contingent remainder, executory devise, or power of appointment," give notice, in such manner as it may order, to all persons who are or may become interested, appointing a next friend for all minors or persons not interested, and may, upon hearing, appoint one or more trustees, who must give bond in a sum to be fixed by the court, and are then authorized to sell and convey the estate, and "hold, invest or apply" the proceeds for the benefit of the parties in interest. It has been held, in cases under this law, that, as the proceeding is in rem, the petition and citation must clearly identify the land sought to be sold; that the decree is void unless the next friend (or guardian ad litem) is appointed first; also, that the probate court does not gain jurisdiction by its own judgment on the character of the remainder, but that, when it is contingent, the order of sale is of right due to the petitioner.³³⁴

In South Carolina, there is no statute authorizing the sale of settled estates by the chancellor. In one case the whole fee was decreed to be sold at the instance of the owner of the defeasible fee, against the protest of the party having the executory devise; but the decree was reversed as unauthorized.³³⁵

§ 157. Subject-Matter.

Every reader of Blackstone knows that in the old division of powers among the English courts a sentence for felony by the court of common pleas, or a judgment on a writ of right in the king's bench, would have been void, as *coram non judice*. But the cases as they arise in practice are hardly ever so plain. In theory, the want of jurisdiction of the subject-matter cannot be waived either by the express agreement of parties (for a court cannot become an arbitrator) or by their going into the merits on the disputed law and facts. Thus, if on the face of the pleadings the plaintiff and defendant to any controversy in the circuit court of the United States are citizens of the same state, or if the amount involved is less than \$2,000 (formerly \$500), the suit, as between them, will be dis-

³³⁴ Pub. St. c. 120, §§ 19-21; Pratt v. Bates, 161 Mass. 315, 37 N. E. 430; Bamforth v. Bamforth, 123 Mass. 280; Symmes v. Moulton, 120 Mass. 343.

³³⁵ Baker v. Baker, 1 Rich. Eq. 392. The syllabus affirms the power of the chancellor to make such a sale; but it is not borne out by the opinion.

missed, whenever the court discovers the defect, or will even be reversed for want of jurisdiction, after trial and judgment on the merits. Yet, if a judgment has been rendered, and not reversed on error (still more, if either corrected or affirmed on error or appeal), the supreme court will not allow such judgment to be treated as a nullity, when it comes up collaterally; not, at least, when there is some color for the jurisdiction, on which the federal courts must have passed in deciding the case. And in a late case (in which all the prior decisions of the supreme court are reviewed) the decision of the highest state court in Oregon, disregarding the sale of lands under the decree of the federal court, as being outside of its jurisdiction, is reversed, as failing to give the proper effect to a defense resting on federal authority.³³⁶

First, as to judgments for the payment of money. The statutes of most of our states give to justices of the peace, or other inferior courts which proceed in a summary way, jurisdiction over all suits for small sums of money, up to \$50 or \$100, or \$200, or more (the limit has been gradually raised, as the wealth of the country increases); and this jurisdiction is in whole or in part (that is, below a somewhat lower limit) made exclusive of the superior courts. When a justice of the peace renders a judgment in an action involving a sum of money beyond the limit,—that is, in an action in which the plaintiff demands a larger sum,—his judgment is void, though for a sum far within the limit. In like manner, if the superior court entertains an action in which a smaller sum is demanded than the lower limit of its jurisdiction, the judgment rendered is void; while, on the contrary, valid judgments are rendered every day for very small sums, for instance, those for nominal damages, which derive their validity from the sum sued for, and named in the declaration, complaint, or petition,—a sum great enough to call forth the functions of a higher court.

³³⁶ Erwin v. Lowry, 7 How. 172, and Lacassagne v. Chapuis, 144 U. S. 119, 12 Sup. Ct. 639, were cases in which the attempt was made to attack the jurisdiction on new facts, which was of course inadmissible; but in Des Moines Nav. & R. Co. v. Iowa Homestead Co., 123 U. S. 552, 8 Sup. Ct. 217, the record showed that one of the parties whose rights had been passed on was a citizen of the same state with his adversaries. And see Dowell v. Applegate, 152 U. S. 327, 14 Sup. Ct. 611, quoting Kemp's Lessee v. Kennedy, 5 Cranch, 173; (1180)

Great care must be applied in correctly reading the statutes, as they differ on two important points. Some of the statutes fix the limit at a named sum, exclusive of interest and costs, while others state such a sum "exclusive of costs," in which case the interest must be computed to the time of suit brought, to either confer or take away jurisdiction.³³⁷ Again, some statutes confer on the lower court jurisdiction in all cases, say, of "not exceeding one hundred dollars," while a few would put it at "less than one hundred dollars." In the former case a suit for exactly \$100—and suits for these round sums are quite frequent—would be within, in the latter case it would be without, the jurisdictional limit of the lower court, and vice versa as to the higher.³³⁸

Several claims may be united, if held by the same plaintiff against the same defendant.³³⁹ If they are united in good faith, the higher court does not lose jurisdiction, if some of these claims are thrown out on demurrer, or otherwise before the termination of the suit; and it would seem that the judgment of the trial court for the residue must determine the question of good faith, and that it cannot be collaterally attacked.³⁴⁰

Skillerns v. May's Ex'rs, 6 Cranch, 267; *Cameron v. McRoberts*, 3 Wheat. 591; *McCormick v. Sullivant*, 10 Wheat. 192; *Ex parte Watkins*, 3 Pet. 193; *Bank of United States v. Moss*, 6 How. 31.

³³⁷ United States, Rev. St. § 629, gives to the circuit court jurisdiction when the amount involved, exclusive of costs, exceeds the sum of \$500. The acts of 1887 and 1888, if, "exclusive of interest and costs, it exceeds \$2,000." The latter mode of setting the limit prevails now in most of the states. But see Connecticut, Gen. St. § 723, limiting the jurisdiction of the common pleas to amount exceeding \$100, and not exceeding \$500, and by section 810 only interest accruing after suit brought may be added to the upper limit by this or any other limited court.

³³⁸ See cases where the jurisdiction of the United States circuit courts, under the judiciary act, was sustained, the amount in controversy exceeding \$500. *Martin v. Taylor*, 1 Wash. 1, Fed. Cas. No. 9,166; *Muns v. Dupont*, 2 Wash. 463, Fed. Cas. No. 9,931; *Judson v. Macon Co.*, 2 Dill. 212, Fed. Cas. No. 7,568 (suit on a number of coupons); *Stanley v. Board Sup'r's Albany Co.*, 15 Fed. 483; same principle, under new limit, *Bernheim v. Birnbaum*, 30 Fed. 885. For a case of the exact limit between justice's and circuit courts, see *Griswold v. Peckenpaugh*, 1 Bush, 220.

³³⁹ *Martin v. Goode*, 111 N. C. 288, 16 S. E. 232; *Blakewell v. Howell*, 2 Metc. (Ky.) 268.

³⁴⁰ *Maggett v. Roberts*, 108 N. C. 174, 12 S. E. 890; *Wiseman v. Witherow*, (1181)

Where an appeal goes from an inferior court, like that of a justice of the peace, to a superior court, it is generally tried *de novo*, and the superior court has no more extended jurisdiction than the tribunal from which the case went up; and such is also the case where a higher court retries a controversy upon appeal from a court of probate.³⁴¹

In suits in which a personal judgment for money is sought, the amount sued for is generally the only test for the jurisdiction of a superior court of law, and, at least where the modern practice prevails, also of a court of equity, without regard to the cause for which the judgment is asked. Thus, where it was held that a certain tax was collectable only by distress or ministerial sale, and not by suit, and the judgment was reversed as erroneous, yet the court, in the same opinion, in passing in appeal, on a motion to quash a stay bond given under the same judgment, sustained the refusal to quash, because the judgment, being above the lower limit, was within the jurisdiction.³⁴²

A matter already mentioned is the grant of administration on the estate of a living person. It is said the ordinary has jurisdiction to appoint administrators for dead men's estates, not for those of live men. But the first reported case in which the title to land really depended on the validity of an administration granted upon a living man's estate was decided in 1894 by the supreme court of the United States. The voidness of the whole proceeding, including a license and the sale under it, was put mainly on the ground that to sustain the judgments of appointment and of license was to deprive a man of his property without due course of law.³⁴³

90 N. C. 140; Schunk v. Moline, Milburn & Stoddart Co., 147 U. S. 500, 13 Sup. Ct. 361 (where a good defense to part of the claim was apparent). Bowman v. Railway Co., 115 U. S. 611, 6 Sup. Ct. 192.

³⁴¹ Fleming v. Limebaugh, 2 Metc. (Ky.) 267; and similar cases may be found in the notes to the Code of Procedure of almost every state. But very few of these questions have come up on collateral attack.

³⁴² Johnston v. City of Louisville, 11 Bush, 527; and, conversely, Hallock v. Dominy, 69 N. Y. 238. The contrary doctrine announced in Branham v. Mayor, etc., of San Jose, 24 Cal. 585, where a judgment ordering a sale under a municipal mortgage was held void, because the mortgage itself was *ultra vires*;

³⁴³ Scott v. McNeal, 154 U. S. 34, 14 Sup. Ct. 1108, where the plaintiff had disappeared and nothing had been heard of him for seven years.

Although probate courts are now almost everywhere considered of the rank of superior courts, in as far as they are entitled to the presumption of regularity in their proceedings, yet as to the subject-matter their jurisdiction can never be extended beyond the words of the statute. Thus it is usual to give to such a court the power to hear the applications of an administrator, for carrying out land contracts of his intestate; and, if he does so under leave of court, his act would bind the heirs. But such a law would not enable the court to adjudge specific performance at the instance of the obligee.³⁴⁴

Judgments have been collaterally assailed because the defendant, though personally summoned within the state, did not reside in the county, or was not found in the county, in which the court sat, and over which it regularly exercised jurisdiction. But here the rule is this: that, if the defendant could by his answer or appearance have given jurisdiction to the court, he must, when summoned, make his objection in time. If he does not, a judgment rendered by default upon service within the state will be valid at any rate, though in one or the other state it may be erroneous.³⁴⁵

A judgment may also lack validity because it "lies outside of the issue." A suit is brought to recover, to divide, to subject to some charge certain land described in the plaintiff's complaint or like pleading, or a named interest in such land. Judgment is given for other land, or affecting another interest therein, or subjecting it to other charges. On this the parties have not been heard, have had no opportunity to be heard. Unless the new subject is otherwise brought before the court, the judgment, at least for the excess, is void. Or, an action is brought to recover one or more sums, on one or more named causes of action. A judgment is rendered by de-

a decision hard to justify, for the very point of ultra vires was passed upon in the first judgment.

³⁴⁴ *Houston v. Killough*, 80 Tex. 296, 305, 16 S. W. 56. The probate courts of Texas, under an act of 1842, were given the jurisdiction stated in the text, in addition to all probate and testamentary matters.

³⁴⁵ *Wickliffe v. Dorsey*, 1 Dana, 462 (ejectment to avoid a chancery sale brought against defendants in a foreign county). Judge Van Fleet, in his work on *Collateral Attack*, quotes many other cases from Missouri and Illinois; but in these the courts refused to set such judgments aside, even upon motion in the same case.

fault for these, and moreover for another sum, not named in the complaint, and a sale of land for the whole judgment has taken place.³⁴⁶

But, if the pleading, in the nature of the bill or declaration, either by statement or prayer, indicates the relief which is desired, and such relief is given by the court in the judgment, the latter cannot be assailed as void on the ground that the facts which are set forth in such pleading lay no foundation for it.³⁴⁷

When one court takes hold of a chattel (e. g. a ship), no other court can thereafter entertain jurisdiction of a suit by which the possession of that chattel is affected. But, when a piece of land has become the subject of a suit, this is not so plain, because, generally speaking, no bodily possession is taken, an attachment being levied simply by writing a description of the land on the back of the writ, or, at most, by a momentary entry and posting. Does such a levy deprive other courts of jurisdiction over the land? And how is it, when a receiver has been appointed by the court, which first gains jurisdiction?³⁴⁸ These conflicts are most annoying when one of the

³⁴⁶ In *Munday v. Vail*, 34 N. J. Law, 418, it appeared that a voluntary deed had been assailed by a creditor of the grantor as fraudulent, and that the court had rendered a decree setting it aside, not only as to the assailing creditor, but outright as between the parties. In a suit between one claiming under the grantor, after such decree, and the original grantee, the chief justice said: "To constitute [jurisdiction] there are three essentials: First, the court must have cognizance of the class of cases, etc.; second, the proper parties, etc.; third, the point decided must be within the issue. A judgment upon a matter outside of the issue must be altogether arbitrary and unjust, as it concludes a point on which the parties have not been heard, or have had the opportunity of a hearing, etc. In the note to the *Duchess of Kingston's Case*, 2 Smith, Lead. Cas. Eq. 735, Baron Comyn is vouched for the proposition that judgments are conclusive as to nothing which might not have been in question, or was not material. For the same doctrine I refer to *Lord Redesdale*." *Giffard v. Hort*, 1 Schoales & L. 408; *Gore v. Stacpoole*, 1 Dow, 30; *Colclough v. Sterum*, 3 Bligh, 186; *Corwithe v. Griffing*, 21 Barb. 9 (partition); *Reynolds v. Stockton*, 43 N. J. Eq. 211, 10 Atl. 385 (approves *Munday v. Vail*); *Falls v. Wright*, 55 Ark. 562, 18 S. W. 1044 (where dower had been allotted by commissioners out of lands not named in the pleadings, and the allotment been confirmed, but held void).

³⁴⁷ *Blondeau v. Snyder*, 95 Cal. 521, 31 Pac. 591 (personal judgment on prayer, where facts in complaint showed only grounds for decree of sale).

³⁴⁸ See, as to chattels, *Freeman v. Howe*, 24 How. 450; *Boswell v. Otis*, 9 How. 336.

courts is a national, while the other is a state court. Where a United States district court acts on lands and houses seized under the revenue laws, by which the collector or marshal takes actual possession, it is clear that a state court cannot thereafter give a valid judgment for the sale of the real estate thus seized.³⁴⁹

When the pleadings in a cause set forth a state of facts on which a judgment might be rendered as to several causes of action, or one affecting several parcels of land, or several chattels, all of these demands, lots, or chattels are the "subject-matter" of the suit; and a judgment in favor of the plaintiff, that he recover some one or more of the sums demanded, or some one of the lots, or that some one of the named lots be subjected to sale for a named debt, is in itself a judgment for the defendant as to the other demands, other lots, etc., unless the cause is "retained" by proper words in the judgment or decree.³⁵⁰

That a judgment by the courts of one state adjudging the title and possession of lands in another state will not be enforced or in any way regarded by the courts of such other state; that such a judgment can at most be only enforced by compelling the defendant to execute and deliver a deed,—is an elementary proposition, which hardly needs authority to support it.³⁵¹

§ 158. Retrospective and Private Laws.

Sales of land under legal process, especially sales made by executors, administrators, and guardians, under license of the probate court, have so often turned out defective that legislatures have naturally interfered by curative acts to prevent the upturning of old possessions, and to save innocent purchasers from loss. We have, at another place, discussed similar laws which were passed from time to time to cure defective deeds, or to give force to invalid contracts; and we have seen that in most states such acts have been sustained, on the ground that the new law only carries out the in-

³⁴⁹ Heidritter v. Elizabeth Oil Cloth Co., 112 U. S. 294, 5 Sup. Ct. 135.

³⁵⁰ Ledbetter v. McWilliams, 90 Ga. 43, 15 S. E. 634 (several lots in petition and rule nisi, one left out in judgment,—lien gone).

³⁵¹ Davis v. Headley, 22 N. J. Eq. 115.

tent of the parties, and removes the obstruction interposed by former laws. But there is quite another aspect when a man's property is taken from him, not by his own will imperfectly expressed, but by the pretended process of law, without his will, and without his knowledge. Yet, many of these curative laws have been sustained.

First are those which 'cure defects in the sale of infants' lands ordered and made at the instance of the guardian. A purchaser has paid his money or given his sale bonds; but he has no title, the sale being void for noncompliance with the statute. The legislature steps in and empowers the guardian to apply for a confirmation of the sale, if it is beneficial to the infant; and this is retrospective, not as to the infant, but as to the bidder from whom it takes the right to throw up the purchase, and to reclaim his money. But, as the latter has contracted freely, the curative act only gives force to his intent and may on that ground be sustained.³⁵²

Second. Where there have been such void sales, the legislature empowers the purchaser to apply for ratification on the ground that the sale was, or still is, beneficial to the infant owner. If he is still under age, perhaps the commonwealth may, as supreme guardian, sell the land a second time by ratifying the void sale; but it has no such power over the property of adults, and to sustain the curative act against the protest of the adult owner (which has been done) seems to us contrary to all principle.³⁵³

Third. And this has been done most frequently. The legislature, either by a general or by a private act, without any call for an investigation as to the interest of the parties whose title is to be divested, declares judicial sales already made to be good and valid, although they were void when made and confirmed, and, until the moment when the act was passed, the former owner could have maintained ejectment against the purchaser or those claiming under him. While the supreme court of Pennsylvania has gone to the utmost in upholding laws which give force to inoperative deeds or contracts, it denounces an attempt to give effect to a void judicial sale as arbitrary, and holds it to be utterly void.³⁵⁴ The distinction between

³⁵² Thornton v. McGrath, 1 Duv. (Ky.) 355.

³⁵³ Boyce v. Sinclair, 3 Bush (Ky.) 261. The opinion mistakenly assumes that this second proposition flows naturally from the first.

³⁵⁴ Richards v. Rote, 68 Pa. St. 248. In a partition suit, one part owner (1186)

giving force to the owner's deed and ratifying a void act to which he had never assented was set forth luminously by the supreme court of New Jersey, with regard to the clause in the state constitution of 1844, which counts the possession and protection of property among the natural rights of the citizen, and to the clause which separates the judicial from the lawmaking power; while a similar course of decisions was unavoidable in New York, where even laws curing informal deeds are not tolerated.³⁵⁵

Since the fourteenth amendment to the constitution of the United States has been proclaimed, which clearly forbids the transfer of property rights by legislative enactment, the objection to such laws has become louder and stronger; though most of the state constitutions, long before 1868, contained the guaranty of "due course of law." At any rate, such decisions as that of the supreme court of the United States, which sustained an act of the Rhode Island "general court," legalizing the sale of land by a New Hampshire administratrix, under a license from a judge in her own state, are no longer possible.³⁵⁶

by judgment was allowed to buy out the other; the latter was, under unauthorized order of the orphans' court (as "weakminded"), represented by a committee, on whom process was served. A private act, obtained to ratify this sale, was held void.

³⁵⁵ Maxwell v. Goetschius, 40 N. J. Law, 383. And rightly so held, for remainders in land had been sold in a partition suit at a time when there was no law for reaching them at all, and the remainder-men had not been made parties. In 1861 a general law, both prospective and retrospective, was passed to ratify these sales. See Powers v. Bergen, 6 N. Y. 358.

³⁵⁶ Wilkinson v. Leland, 2 Pet. 656. The general court of Rhode Island was, when it quieted this title, bound by no constitution beyond the royal charter which gave it power to make laws without further definition. As the land sold was insufficient to pay the decedent's debts, and the proceeds were applied to them, the curative act was equitable, and the supreme court was right in upholding it, unless the license of the home judge to sell and convey lands abroad runs altogether counter to all civilized notions. It does not. On the continent of Europe the probate judge is looked upon as the "upper guardian," the "upper curator," and the ordinary guardian or curator acts with his advice, as to land as well as personality, and without regard to the situs of the land. The writer of this note has thrice succeeded in having lands sold, in Switzerland and in Italy, on the license gotten ex parte from the county judge of Jefferson county, Kentucky,—once for an administratrix, once for a guardian, once for a committee.

The supreme courts of California and of Alabama have broadly declared that a sale under a judgment rendered without jurisdiction cannot be cured by the legislature, and this can no more be done by a general than by a special act.³⁵⁷

Here again the supreme court of the United States has shown itself more favorable to the security of titles arising from judicial sales than most of the states. A private act of the legislature of Illinois was sustained which authorized an administrator to sell the descended land, without notice to the heirs, while the general law required notice; in other words, an act was sustained which made one man the agent of another without the latter's consent. On the other hand, the supreme court of California held such an act inadmissible. The former decision was, however, rendered before the fourteenth amendment allowed the court to look to other limitations than those of the constitution of Illinois.³⁵⁸

All private acts for selling or otherwise disposing of the lands of persons under disability have for a long time been forbidden by the constitutions of nearly all the states,—long before later revisions forbade the granting of special charters. The older decisions on the subject have thus become mainly a matter of historical interest. Among these the opinion of the supreme court of New Hampshire, given upon request of the house of representatives, and that of the supreme court of Tennessee, rendered in setting aside a deed made under a special act, stand out boldly. Such private acts are con-

³⁵⁷ *Pryor v. Downey*, 30 Cal. 388, quoting from 1 Kent, Comm. 456: "It seems to be settled as the sense of the courts of justice in this country that the legislature cannot pass a declaratory act, or act declaring what the law was before its passage." There was no equity in the purchaser. In *Nelson v. Rountree*, 23 Wis. 367, where a decree of sale was void for defective publication the Wisconsin act of 1865, directing that all orders of publication theretofore made under the Revised Statutes (chapter 124) shall be evidence of all prerequisites, was held unconstitutional, as making a judgment what was not such before. But in *Walpole v. Elliott*, 18 Ind. 259, a law validating a class of judgments taken out of term time was sustained, and probably the supreme court of Indiana will sustain the act of 1885, which seeks to validate sales made before that time by commissioners of court instead of executors or administrators. See Rev. St. § 2373a. The supreme court of Alabama gave its views in *Robertson v. Bradford*, 70 Ala. 385. The legislature cannot divest a title by giving force to a void decree.

³⁵⁸ *Florentine v. Barton*, 2 Wall. 211; contra, *Brenham v. Story*, 39 Cal. 179. (1188)

denied—First, as overstepping the line between legislative and judicial functions; secondly, as violating the guaranty that no one shall be deprived of his property otherwise than “by the law of the land,” which is the older equivalent of “due course of law.”³⁵⁹ In most of the other states these private acts were so common that no question was ever raised about them, but in Kentucky, Massachusetts, and New York all the points were raised, and private acts directing the sale of infants’ lands, either for the debt of the ancestor or for the supposed benefit of the infant, were sustained. It is said that nothing judicial is done in supplying the incapacity of the infant; that the legislature acts only as *parens patriæ*; that it does not deprive a person of his property when it only helps him to use it in a manner in which he could not have used it otherwise, and in which he would have used it if he could, etc. The reference to a court or judge, who is to ratify the sale, under a discretion left to him, is deemed immaterial either way.³⁶⁰

In a comparatively late case in California, a private act of 1858 came into consideration, which enabled a father to become guardian for his child, and sell his interest in a tract of land for reinvest-

³⁵⁹ Stimson, in Amer. Statute Law (1885) p. 95, enumerates the following states in which special laws for subjects of this kind are forbidden by the constitution. For the sale of real estate, Michigan, Arkansas; for the sale of real estate of persons under disability, New Jersey, Illinois, Wisconsin, Minnesota, Nebraska, Virginia, West Virginia, Kentucky, Nevada, Colorado; for such sale by executors, etc., Indiana, Maryland, Oregon; affecting the estates of minors, etc., Pennsylvania, Missouri, Texas, California, Louisiana; giving effect to informal deeds or wills, Maryland, Missouri, Texas, California, Colorado, etc. In some the prohibition is broader, as in Kansas, Arkansas, Alabama, Georgia. The constitutions which have been adopted since 1855 have in all cases restrained special legislation still further. It must not be forgotten that the sale of the lands of persons under disability was originally done altogether under private acts of parliament, and when Lord Hardwicke disclaimed any power as chancellor to bind the inheritance of an infant he declared this to be the province of private acts.

³⁶⁰ Rice v. Parkman, 16 Mass. 326; Davison v. Johonnot, 7 Metc. (Mass.) 388; Cochran v. Van Surley, 20 Wend. 365; Shehan v. Barnett, 6 T. B. Mon. 593; Kirby v. Chitwood, 4 T. B. Mon. 91, which precede and are quoted in 20 Wend. 365. The constitution of New York, under which the case in 20 Wend. arose, had no clause in it guarantying “due course of law.” The court intimated that it might be otherwise under the constitution of 1820, which contained such a clause.

ment, while the general law as it then stood allowed such sales only if necessary for maintenance and education. There were strong equities against the child, the estate having been a gift from his father, and the deed under the special act was sustained.³⁶¹

It may here be stated that while the legislature may dispose of the property of infants and persons of unsound mind, and of persons unborn, for their supposed benefit, that is, with a view to education and maintenance, or of reinvestment, it is the better opinion that it cannot thus assume a guardianship over the estates of adults who are of sound mind. An act providing for the sale of estates limited for life, with remainder over, has been held unconstitutional, as far as it might affect the estates of living adult remainder-men, otherwise than with their consent; and a sale made under such an act would probably be held void as against the rights of parties thus deprived of their estate against their will.³⁶² A law applicable to decrees of sale or "licenses" which have already been entered or awarded, and which directs that they shall not be assailed for any irregularity or defect, after the lapse of five years, is at any rate good as a statute of limitations, though it might not be sustainable on any other grounds.³⁶³

§ 159. Parties and Privies.

In the introductory part of this chapter it has already been said that judgments are binding only upon parties and privies.³⁶⁴ It remains to be seen who are the same parties and who are privies.

³⁶¹ *Brenham v. Davidson*, 51 Cal. 352.

³⁶² *Gossom v. McFerran*, 79 Ky. 236.

³⁶³ *Mitchell v. Campbell*, 19 Or. 198, 24 Pac. 455 (as to an act of 1874).

³⁶⁴ See section 143, note 20. Aside of text-books on *Estoppel*, the best collection of authorities can be found in the notes (Eng. and Am.) to the *Duchess of Kingston's Case* and *Doe v. Oliver*, in 2 *Smith, Lead. Cas.* 605, 609. The former case was a prosecution for bigamy, in which the duchess set up in her defense the sentence of the ecclesiastical court in a suit for jactitation of marriage, holding that she was not married to the first husband. The king not being a party to that suit was not bound by the sentence. On the other hand, when the sovereign is the plaintiff both in a criminal cause and in a revenue cause, seeking to forfeit the defendant's land, an acquittal in the former, if the facts necessary to constitute the misdemeanor and the ground of forfeiture are the same, bars the latter. *Coffey v. U. S.*, 116 U. S. 427,

A judgment rendered against a person who throughout the proceedings is named only in his natural capacity, and which purports to bind him as an individual, is, upon high authority, considered, as not binding the property of which such individual holds the title only in an official or fiduciary character,—as an assignee in bankruptcy, or as a trustee of an express trust; for otherwise those beneficially interested would be affected by a judgment to which they were not parties, either actually or constructively.³⁶⁵

The corresponding position—that a judgment standing against a party in a fiduciary capacity does not bind him individually—is also measurably true, but not to the full extent. Thus an action brought by the mortgagee, claiming to sue as guardian for his children, being adjudged against him, those claiming under him in his own right would be barred only if it appeared that the merits of the mortgage had been before the court. A judgment obtained by a creditor against the executor would not bind other heirs and devisees (unless in states where lands are assets for all purposes), but it would bind such executor when himself a devisee. It seems that if the party to the former suit was personally interested to any extent in the trust which he represented, he should be bound by the judgment.³⁶⁶ Where a person, though not a party of record, is the real party in interest and manages the suit, or takes part in carrying on the prosecution or defense, such person will be bound by the judgment; and, if the side representing him is successful, will have the right to rely upon the judgment on that side as an estoppel in his favor.³⁶⁷

A judgment which is void against one of the parties for want of

6 Sup. Ct. 437. Some exceptional features of this subject have been shown under the head of "Partition in Kind."

³⁶⁵ Landon v. Townshend, 112 N. Y. 93, 19 N. E. 424 (bankrupt assignee); Rathbone v. Hooney, 58 N. Y. 463 (trustee with no power to make the deed in question). See Robinson's Case, 5 Coke, 32, 33. As to different individual rights, see McNutt v. Trogden, 29 W. Va. 469, 2 S. E. 328.

³⁶⁶ McBurnie v. Seaton, 111 Ind. 56, 12 N. E. 101; Boykin v. Cook, 61 Ala. 472.

³⁶⁷ Plumb v. Goodnow's Adm'r, 123 U. S. 560, 8 Sup. Ct. 216 (benefit of former judgment), distinguished from Litchfield v. Goodnow's Adm'r, 123 U. S. 549, 8 Sup. Ct. 210. Lyon v. Stanford, 42 N. J. Eq. 411, 7 Atl. 869 (wife bound as to easement, by judgment against her husband for damages; rather hard).

process is not the less valid against the others who have appeared, or who are served. Hence a decree of sale, void as against the mortgagor, is valid against the plaintiff, the mortgagee; and, as a decretal sale carries the interest of all the parties to the suit, the sale in such a case will invest the purchaser with that of the plaintiff, and make him an assignee of the mortgage.³⁶⁸ On the other hand, a junior mortgagee, who has not been made a party to a suit for the enforcement of the elder mortgage, is bound neither by the decree nor by the sale, and may, in a suit to redeem or to sell, treat the purchaser under that sale as a mere assignee of the other parties to the suit.³⁶⁹

Who are privies to the judgment is plain enough. In the first place, privies by blood or representation; that is, the heirs, devisees, executors, or administrators of a party who dies after judgment rendered. Next, privies in estate,—those to whom the subject-matter of the suit is granted or assigned after judgment. And the latter class of privies is by the doctrine of "lis pendens," which will be treated in the next following section, extended to all those who gain their interest in the subject of the suit by grant or assignment pending the suit.³⁷⁰ The distributees or legatees are so far identified with the personal representative, the creditors under a deed of an assignment with the assignee, that, in the absence of collusion between him and the party opposed to him, they are bound by the judgment against him; such as a dismissal of his suit for assets, or the setting aside of the assignment, and the subjection of the lands embraced therein to hostile claims.³⁷¹ But where a trust is worked out ex maleficio, the cestuis que trustent should not be bound by the acts or by the neglect of a trustee in invitum, who cannot be presumed to guard their interest.³⁷² One who holds a

³⁶⁸ *Townshend v. Thomson*, 139 N. Y. 152, 34 N. E. 891; *Jordan v. Sayre*, 29 Fla. 100, 10 South. 823; *Dutcher v. Hobby*, 86 Ga. 198, 12 S. E. 356.

³⁶⁹ *Holliger v. Bates*, 43 Ohio St. 437, 2 N. E. 841; *Campbell v. Hall*, 16 N. Y. 575. See, as to practice in Pennsylvania in *sci. fa. sur* mortgage, chapter "Incumbrances," § 100, as to rights of terre-tenants.

³⁷⁰ It has been shown elsewhere that where the common-law rule of descent prevails the heirs or devisees are not bound by a judgment against the administrator. And see *Starke v. Wilson*, 65 Ala. 576.

³⁷¹ *Field v. Flanders*, 40 Ill. 470.

³⁷² *Shay v. McNamara*, 54 Cal. 169. On the other hand, court of equity may, (1192)

deed from the defendant, delivered before the judgment, or the attachment to which it relates back, has become a lien thereon, is not a "privy" to that judgment. Yet he may be interested in opposition to it; either where, under the registry laws, his deed is postponed, not having been put to record in due time; or because it is attacked as fraudulent or voluntary. For the defense in such a case he may assail the judgment either for errors apparent on its face or because on the true facts the demand on which it rests was not justly owing, or not due.³⁷³ Where a man does not cause a deed or assignment of an interest in land to be recorded, it is natural that the mortgagee or lien holder will sue his grantor, without making him a party. Now, under the registry laws, the plaintiff is fully justified in suing only the party whom he finds on the public records, and the purchaser, buying in good faith at the public sale, will get a good title. But this would happen very much in the same way if the sale had been made under an execution against the grantor.³⁷⁴ Where several notes are secured by the same mortgage, and come by assignment to several holders, all must be made parties to a suit for the enforcement of the lien, or those who are not will not be bound by any judgment that may be rendered against the validity of the mortgage.³⁷⁵ In like manner, where some of the parties who have joined in a mortgage bring a suit to set aside a foreclosure sale, or, generally speaking, where some of the parties owning several interests in land bring a suit upon common grounds, those who did not join are not bound by the unfavorable judgment. The same question was involved, but there is no privity.³⁷⁶

There is some conflict in the treatment of dower. Where the

when trusteeship is in abeyance, deal with the beneficiaries alone; and the decree will bind the legal estate. *Hughes v. Brown*, 88 Tenn. 578, 13 S. W. 286.

³⁷³ *Tarbell v. Jewett*, 129 Mass. 457 (quoting earlier cases in the same state); *Safford v. Weare*, 142 Mass. 231, 7 N. E. 730 (a very strong case where the sale under a judgment was held void because the sum adjudged exceeded the ad damnum in the declaration). *A fortiori*, a decree nisi against a mortgagor to which a prior grantee is not party does not bind the latter as to amount of debt. *Dooley v. Potter*, 140 Mass. 49, 2 N. E. 935.

³⁷⁴ *Shippen v. Kimball*, 47 Kan. 173, 27 Pac. 813.

³⁷⁵ *Todd v. Cremer*, 36 Neb. 430, 54 N. W. 674.

³⁷⁶ *Albert v. Hamilton*, 76 Md. 304, 25 Atl. 341.

wife joins in a mortgage of her husband's property, in order to bar her dower it is not the usual course to make her a party to the suit for foreclosure, and she is considered barred by the sale under the decree; but the rule in the several states differs without the reason being always apparent.³⁷⁷ But she may assail the decree and proceedings for collusion,—if, for instance, the husband having paid the mortgage otherwise, should allow a decree to be rendered, in order to deprive his wife of her dower.³⁷⁸ But a remainder, especially a vested remainder, or a reversion, stands upon higher ground; and the remainder-man in being, or reversioner, should be made a party defendant to a suit for enforcing a charge against the land, or he will not be bound by the decree. On the other hand, ex necessitate rei, unborn remainder-men are bound by whatever decision a court renders in a suit affecting the land. We have seen also that those whose remainders are contingent, are bound by any judgment of partition between those holding vested interests.³⁷⁹

³⁷⁷ Earle v. Barnard, 22 How. Prac. 437; Pitts v. Aldrich, 11 Allen, 39 (widow not made party; yet sale bars her). Similar in principle is Seibert v. Todd, 31 S. C. 206, 9 S. E. 822. Under the old doctrine the mortgagor's estate is only an equity, in which the wife had at first no dower; then, as in other equities, only when the husband dies seised. Contra: She must be made a party. Kissell v. Eaton, 64 Ind. 248; Nimrock v. Scanlin, 87 N. C. 119. In Roan v. Holmes, 32 Fla. 295, 13 South. 339, the mortgage was not closed by sale under decree, but merged by the mortgagee bidding in the land under a stranger's execution. Held not to bar the widow's right to redeem her dower. Crosby v. Farmers' Bank of Andrew Co., 107 Mo. 436, 17 S. W. 1004, where the wife was held interested, as prospective dowress, in the order of sale, also indicates that she is, in Missouri, considered a necessary party to a suit for sale. Borough of York v. Welsh (1887) 117 Pa. St. 174, 11 Atl. 390, indicates that it might be necessary to make the wife a party to proceedings for condemnation. Schweitzer v. Wagner, 94 Ky. 458, 22 S. W. 883, where the mortgaged land was sold in bankruptcy for a fair price, the wife being present, but not impleaded in any way, she was held barred of her dower; proceeds on other grounds, but intimates that the wife need not be joined; and such is the common practice in Kentucky. In Virginia, the widow's right is cut off by section 2269 of the Code, if the proceeding for sale was carried on in good faith.

³⁷⁸ McClurg v. Schwartz, 87 Pa. St. 521. This is in analogy to the old English statutes which permit both a tenant for years and a dowress to controvert a judgment obtained by collusion against the holder of the freehold.

³⁷⁹ Hughes v. Brown, 88 Tenn. 578, 13 S. W. 286, as to unborn remainder- (1194)

The most difficult branches of this subject, which can only be treated fully in works on practice and on judgments, are these: What is a final judgment, in distinction to an interlocutory order, and what points does a judgment conclude?³⁸⁰ But it may be stated here that in the process of strict foreclosure, or of redemption, the decree nisi—that is, the decree which ascertains the amount due by the owner, or former owner, by the payment of which he can redeem his property, and by the nonpayment of which he will forever lose it—is considered a final decree as far as it ascertains the amount; and though the court may reserve, or may have, even without such reservation, the power to extend the time for redemption further, all parties are bound by the act of the court fixing the amount of charge on the land.³⁸¹ It is hardly necessary to state here, what has been said under "Death and Disability," that a procedure against a deceased mortgagor, resulting in a judgment for selling his land, does not bind the heir or devisee; but it must be understood, with certain reservations, as there shown, when the death occurred after suit brought, and after a service of actual or constructive notice. But the judgment in a suit begun after the debtor's death (except a scire facias in Pennsylvania) would be a nullity, and bind no one.³⁸² As judgments are binding only upon parties and privies (that is, those who claim under the parties by title later than the commencement of the suit), it follows that neither a strict foreclosure, nor sale under a decree for the enforcement of a mortgage or lien, is of any effect against a purchaser or incumbrancer whose title began before the suit looking to the foreclosure or sale was brought, unless he was made a party. Unless made a party, he can redeem from the complainant, who has obtained a strict foreclosure, after it as he might before;

men. See section on "Sale of Settled Estates." See, also, above, "Partition in Kind."

³⁸⁰ E. g. a judgment for defendant, in a suit to set aside a deed, is a bar to a subsequent suit to have it declared a mortgage. *Harris v. Barnhart*, 97 Cal. 546, 32 Pac. 589. Compare, also, what is said in the section on "Subject Matter."

³⁸¹ *Fuller v. Eastman*, 81 Me. 284, 17 Atl. 67.

³⁸² *Richards v. Thompson*, 43 Kan. 209, 23 Pac. 106; *Craven v. Bradley*, 51 Kan. 336, 32 Pac. 1112 (the proceedings were, of course, upon constructive service).

and from the purchaser, as he might have redeemed from the lien holder or mortgagee, who obtained the decree. If he is only an incumbrancer himself his right to redeem may of course be taken away, by paying off his incumbrance.³⁸³

§ 160. Pendente Lite Purchasers.

It is an old principle of equity that he who after the institution or beginning of a suit buys, or, in any other way than through the death of the former owner, acquires, the subject-matter of the suit, is bound by the result of that suit, and has no right to make himself a party to it. Thus, if A is enforcing a vendor's lien against B upon a tract of land, and, after suit brought, C buys the tract from B, the complainant, A, may carry his suit to decree without noticing C's purchase; nor will C be allowed to intervene and to be made a party on his own petition. All he can do is to await such sale as may be awarded, and claim the surplus of that sale, in land or proceeds as against B. Where other than equity courts enforce liens and mortgages, or adjudge the sale of lands for any purpose, the same principle must apply from very necessity; for, if the purchaser had the right to have himself substituted for or added as a party to the original defendant, he might at once transfer his rights to a new purchaser, who might claim the same privilege, and the suit could never be brought to an end.³⁸⁴ The purchaser is

³⁸³ As to what persons in interest may redeem, see Story, Eq. Jur. § 1063. It is said (*Tuolumne Redemption Co. v. Sedgwick*, 15 Cal. 515, 529) the principle is stated as one fully known and admitted. Speaking of a statute allowing redemption after a decretal sale, the court says: "But this statute is not a substitute for his right to redeem as mortgagee by the general principles of equity applicable to mortgages. If he was made a party to the suit, he might at any time before foreclosure have redeemed, etc. If not made a party, the mortgagee is not bound at all by the decree of foreclosure, and may file his bill to redeem at any time within the statutory bar."

³⁸⁴ 2 Kent, Comm. 122. See leading English cases in Sumner's note 2 to *Bishop of Winchester v. Beavor*, 3 Ves. 314, viz.: *Garth v. Ward*, 2 Atk. 175; *Metcalfe v. Pulvertoft*, 2 Ves. & B. 205; *Lloyd v. Passingham*, 16 Ves. 66; *Parkes v. White*, 11 Ves. 233; *Gaskell v. Durdin*, 2 Ball & B. (Ir. Ch.) 167. From the last, the leading American case, *Murray v. Lylburn*, 2 Johns. Ch. 445, quotes: "It is difficult to draw a line, and very dangerous to allow of the rule being frittered away;" and states that the sale of land in dispute in an

notified and bound only as to land which is described or identified in the suit, and only as to the claims or equities set up by the plaintiff, or admitted by the defendant from whom he buys, in their respective pleadings; not as to other matters which the record of the suit discloses, such as an equity set up by another defendant in his answer.³⁸⁵ The effect of the *lis pendens* upon purchasers is thus threefold: (1) A purchaser is bound by the decision of the court between the original parties; (2) he has constructive notice of such equities as are set up in the suit, but only for the purposes of such pending suit; (3) he is bound by such liens or equities as arise from the institution of the suit itself, but, again, only if the suit is successful.³⁸⁶

In many states regulations are made for registering the pendency of suits affecting land in the county in which the land lies, at the office for registering or recording deeds and mortgages; and unless and until this is done a purchaser in good faith and for value is not affected with notice, either of the suit or of its contents, for either of the three purposes stated. This notice must generally contain the style of the suit, giving the names of those defendants whose property is to be affected, as fully as a mortgage; a description of the land, sufficient to identify it ("all the defendant's land in _____ county" being insufficient); and the object of the suit, which, if it is brought for the enforcement of a lien, would mean, above all, a statement of the sum demanded. Where the defendant in his answer prays affirmative relief against land he may file a like notice.³⁸⁷

action was champerty at common law. The suits in which the *lis pendens* is oftenest invoked, are for specific performance of contracts for land (*Chapman v. West*, 17 N. Y. 125 [against a mortgagee]); or on unreserved vendor's liens (*Wagner v. Smith*, 13 Lea, 560); for fraud in obtaining deed, or to set aside conveyances in fraud of creditors. One who buys at a decretal sale is a *pendente lite* purchaser as to a suit against the mortgagor, though the mortgage under which he bought is older than the suit. *Randall v. Duff*, 101 Cal. 82, 35 Pac. 440.

³⁸⁵ *Jones v. McNarrin*, 68 Me. 334; *Russell v. Kirkbride*, 62 Tex. 455; *Bel-lamy v. Sabine*, 1 De Gex. & J. 566.

³⁸⁶ *Murray v. Ballou*, 1 Johns. Ch. 577.

³⁸⁷ New York, Code Civ. Proc. §§ 1670–1674, in place of Code Proc. § 132, and subsequent amendments, dating in the main from an act of 1840. The English act is 3 & 4 Vict. c. 11, § 7. A general description, such as "all lands owned by defendants," is ineffectual. *Jaffray v. Brown*, 17 Hun, 575.

The present New York statute allows the notice to be lodged as soon as the complaint is filed, and thus denotes what shall be the beginning of the suit for this purpose. Where the statute is not thus specific, a notice, lodged in the registry of deeds, of a suit which is not yet begun, within the true meaning of the law, is void, as you cannot make known a fact which does not exist.³⁸⁸ In such a case, and still more where no statute requires such an entry, the question is: When is a suit begun? The laws of many states direct that a suit is commenced when process is issued; and this, again, can only be done after the declaration, complaint, or petition is filed.³⁸⁹ This is the point of time to which the bar of the statute of limitation runs; but more is required to have the pendency of the suit become binding upon third parties. In some cases a suit is not deemed to be commenced, for any purpose, until process is served, or publication made.³⁹⁰ And, wherever the law does not regulate the public notice

Effect lost unless process is served in 60 days. *Ferris v. Plummer*, 46 Hun, 515 (one day added for Sunday). See Michigan (act for canceling passed June 18, 1889), Wisconsin, Virginia (§ 3566), West Virginia (c. 139, § 13). North Carolina, Code, § 229, is construed as making the filing necessary only to bind land in a county other than where the suit is brought. *Spencer v. Credle*, 102 N. C. 68, 8 S. E. 901; law explained in *Collingwood v. Brown*, 106 N. C. 362, 10 S. E. 868. In West Virginia, service of process before bill filed makes a good lis pendens. *Harmon v. Byram's Adm'r*, 11 W. Va. 511. In Virginia, unless the notice is docketed, the suit is ineffective against purchasers. *Easley v. Barksdale*, 75 Va. 274. And so in West Virginia. *De Camp v. Carnahan*, 26 W. Va. 839. California, Code Civ. Proc. § 409 (in all suits affecting title or possession); Missouri, § 6759 (equity, right, claim, or lien); Ohio, § 5055 (recognizes common law) and § 5056 (written notice in proper county). A separate tract in another county is not protected. *Benton v. Shafer*, 47 Ohio St. 117, 24 N. E. 197. The statutory notice need not be given, to bind purchasers after judgment. *Sheridan v. Andrews*, 49 N. Y. 478; *Page v. Waring*, 76 N. Y. 463.

³⁸⁸ Kentucky, Code Prac. § 39, under which there is no direct decision against a purchaser; but it is said in *Hall v. Grogan*, 78 Ky. 11, and *Kellar v. Stanley*, 86 Ky. 240, 5 S. W. 477, that there is no lis pendens till a valid summons issues.

³⁸⁹ At least, in those states in which the clerk issues the summons; e. g. Kentucky, Code Prac. § 39. Nebraska (§ 4555, "at date of summons which is served upon him," or on the date of the first publication) takes an intermediate position.

³⁹⁰ Wisconsin, How. Ann. St. § 2629. In no case is a purchaser bound by
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to be given of the suit, it seems that though issue of process is a commencement of the suit against the defendant, good enough within the statute of limitations, third persons are not affected till the defendant is summoned; and such are the precedents of the English chancery; and a purchaser without actual notice who becomes such before service or appearance is not bound by the decree unless he is made a party.³⁹¹

The benefit of a suit well begun is lost whenever it is discontinued or abandoned. One who purchased while it was pending is no longer affected by constructive notice, nor is he bound by the decree in a new suit, to which he is not made a party.³⁹² Moreover, it is said that courts of equity regard the *lis pendens* doctrine as harsh, and will not help the complainant to "mend his hold," in order that he may overreach a purchase made in good faith while his suit was

the decree because suit, to his knowledge, was threatened when he bought. *France v. Holmes*, 84 Iowa, 319, 51 N. W. 152.

³⁹¹ *Banks v. Thompson*, 75 Ala. 531 (execution before service of subpoena); *Sanders v. McDonald*, 63 Md. 503; *Newman v. Chapman*, 2 Rand. (Va.) 93; *Haughwout v. Murphy*, 22 N. J. Eq. 531 (bill filed and subpoena served); *Jackson v. Dickenson*, 15 Johns. 309. In *Majors v. Cowell*, 51 Cal. 482, a suit in the United States circuit court being under consideration, it was said that the United States rules in equity do not touch the question of *lis pendens*. It is, therefore, in these courts, left to the practice of the high court of chancery in England; and there the *lis pendens* notice dates only from service of process or appearance. This rule is traced back to an anonymous case, 1 Vern. 318. *Butler v. Tomlinson*, 38 Barb. 641, and *Burroughs v. Reiger*, 12 How. Prac. 171, are cases of premature filing. *Hayden v. Bucklin*, 9 Paige, 512. *Sanders v. McDonald*, 63 Md. 503, takes the distinction between the defendant and purchasers. To same effect, *Staples v. White*, 88 Tenn. 35, 12 S. W. 339, and *Tharpe v. Dunlap*, 4 Heisk. 674, and other Tennessee cases there quoted; *Hallorn v. Trum*, 125 Ill. 247, 17 N. E. 823; *Franklin Sav. Bank v. Taylor*, 131 Ill. 376, 23 N. E. 397; *Duff v. McDonough*, 155 Pa. St. 10, 25 Atl. 608; *Lyle v. Bradford*, 7 T. B. Mon. 111, 116 (arguedo, but assuming the position as conceded).

³⁹² *Allison v. Drake*, 145 Ill. 500, 32 N. E. 537; *Davis v. Hall*, 90 Mo. 659, 3 S. W. 382 (reinstatement unavailing). But see the *lis pendens* retained upon transfer to another court, *Smith v. Coker*, 65 Ga. 461. The English precedent is *Preston v. Tubbin*, 1 Vern. 286. In *Bishop of Winchester v. Paine*, 11 Ves. 201, doubt is expressed as to purchase after abatement by death and before revivor. The notice on the registry is canceled on dismissal. See *New York, Code Civ. Proc.* § 1674.

pending.³⁹³ The benefit of the lis pendens may also be lost by great laches (ordinary delays will not do it), such as a suspension of all active steps for several years, and certainly a break in the progress of the suit as long as the bar of the statute.³⁹⁴ A cross bill or counterclaim by one of the defendants against the plaintiff or against a co-defendant or stranger has the effects of a lis pendens, as much as the original bill or complaint,³⁹⁵ but only from the time when it is filed; and, if it requires the issual or service of process, from the time that this is done the purchaser from the plaintiff is not affected by equities which the defendant may set up against him after such purchase is made.³⁹⁶ Where a suit setting up an equity or lien against a tract of land has been decided in favor of the defendant, and the plaintiff appeals, or in favor of the plaintiff, and the defendant surrenders the land, but appeals, though no appeal bond is executed, and the judgment is not superseded, the pendency of the appeal works as a lis pendens against purchasers.³⁹⁷ But whether, after a decree for the defendant, and during the time during which the complainant may appeal, and before he has done so, the suit, which seems to be determined, shall be deemed to be still pending, so as to affect one who purchases the land involved in the meantime, is a more difficult question. The old English doctrine was to the effect that the suit was pending till the time for appeal or review expired,—which is especially harsh where the time allowed is lengthened out by disabilities,—and has not been generally adopted in this country.

³⁹³ Sugd. Vend. (1st Ed.) p. 537; Clarkson v. Morgan, 6 B. Mon. 447. A bill for discovery or to perpetuate testimony is not notice of its contents, as the only operation of the lis pendens is to subject the purchaser to the decree. Newman v. Chapman, *supra*.

³⁹⁴ Hayes v. Nourse, 114 N. Y. 595, 22 N. E. 40 (delay so great as to lull all fear); Ehrman v. Kendrick, 1 Metc. (Ky.) 146; Watson v. Wilson, 2 Dana, 406 (delay of two years after death of defendant without revivor). Only by the grossest laches the effect of lis pendens is lost. Gossom v. Donaldson, 18 B. Mon. 230, 237; Durand v. Lord, 115 Ill. 610, 4 N. E. 483. The force of the lis pendens is not spent till possession is given under the decree. Newman v. Chapman, *supra*.

³⁹⁵ Comp. *In re Bingham*, 127 N. Y. 296, 27 N. E. 1055.

³⁹⁶ Jacobs v. Smith, 89 Mo. 673, 2 S. W. 13.

³⁹⁷ Carr v. Cates, 96 Mo. 271, 9 S. W. 659; Real Estate Sav. Inst. v. Collonious, 63 Mo. 294; Smith v. Brittenham, 109 Ill. 540. See, for will contest. McIlarath v. Hollander, 73 Mo. 105.

But an ejectment rests on wholly different principles from a suit to enforce a trust or an equitable lien. It is here not a question of notice, and so declared in several of the cases. The right to a writ of error, and to a reversal, if the judgment is wrong, cannot be defeated by a purchase from the party who succeeds in the court below.³⁹⁸

An action of trespass, though the title to land is involved and may form the only issue therein (of course, the so-called action of trespass to try title of Texas is not meant here), is not so far a suit affecting the land as to become constructive notice to purchasers, or to bind them by its result; and the statutory notice, if filed with the county clerk, is simply void.³⁹⁹ It has been held in Iowa, and is probably good law elsewhere, that a suit by the wife for divorce and alimony, though in her complaint she describes land, which she asks to be subjected to her claim for alimony, does not raise a lien in her favor so as to cut out purchasers; and this is fair enough, as the wife can in such cases always have an attachment.⁴⁰⁰

On the question whether an amendment of the complaint, by enlarging the relief asked, or putting it upon entirely different

³⁹⁸ The English doctrine (applying as well to reversal on bill of review for error in the record as to appeal) is approved arguendo in *Clarkson v. Morgan*, 6 B. Mon. 441, and *Watson v. Wilson*, 2 Dana, 406, and expressly in *Clarey v. Marshall*, 4 Dana, 95, *Debell v. Foxworthy*, 9 B. Mon. 228, and *Wooldridge v. Boyd*, 13 Lea (Tenn.) 151. The writ of error is said to be a new suit, however, in *Cheever v. Minton*, 12 Colo. 557, 21 Pac. 710, and *Stout v. Gully*, 13 Colo. 604, 22 Pac. 954. See, as to appeals from probate of wills, section on "Effect of Probate," sub fine. For an ejectment or like suit, see *Dunnington v. Elston*, 101 Ind. 373 (and for needlessness of lis pendens notice in ejectment, *Sheridan v. Andrews*, 49 N. Y. 478); *Harle v. Langdon*, 60 Tex. 555; *Randall v. Snyder*, 64 Tex. 350. *Clark v. Farrow*, 10 B. Mon. 449, here quoted, is hardly in point. But in California, since 1872, the lis pendens notice on the registry is necessary in ejectment suits. *Partridge v. Shepard*, 71 Cal. 470, 12 Pac. 480. Very wisely, a New Jersey act (March 28, 1888) directs that a writ of error must be taken within three months, to retain the lis pendens.

³⁹⁹ *Hailey v. Ano*, 136 N. Y. 569, 32 N. E. 1068; same principle in *Clarkson v. Morgan*, *supra*. A bill for specific performance against the person of defendant, not brought in the county of the situs, does not work as lis pendens. A suit to establish an easement is notice to purchasers. *Wight v. Packer*, 114 Mass. 473. A statutory notice of a suit for debt is of no avail. *White v. Perry*, 14 W. Va. 66.

⁴⁰⁰ *Scott v. Rogers*, 77 Iowa, 483, 42 N. W. 377. See, contra, *Ulrich v. Ulrich*, 3 Mackey (D. C.) 290.

grounds, after a third person has purchased the defendant's estate, will bind him, is a greatly disputed question. It seems to be right, on principle, that the equitable lien of a pending suit should have no greater effect than the legal lien of a mortgage; and, when I find a suit which in its present aspect cannot diminish the value of the land described by more than \$1,000, I should be at liberty to buy it for its full value, less \$1,000, and not be subjected to any greater demand,—certainly not without an opportunity to meet it. And this result must follow where the statute requires a written notice, containing the names of parties, a description of the lands, and the nature of the relief asked, to be entered on the registry. And such is, it seems, the prevailing doctrine.⁴⁰¹

Where the new matter brought into the suit has arisen after the purchase, and is rather "supplemental" than a true amendment, it constitutes, as against such purchaser, a new suit, to which he must be made a party defendant.⁴⁰² And where new plaintiffs are brought into the suit, bringing with them new causes of action, the suit, certainly as to them, if not as to all the plaintiffs, loses its character as an old pending suit.⁴⁰³

The purchaser pending the suit, it has been held, is as much concluded by a judgment which is reached by agreement among the original parties as if it had been reached upon a trial or hearing; his only recourse against such a judgment being an attack for fraud if it has been obtained by unfair collusion between the parties.⁴⁰⁴ The pendency of a suit involving land is notice of whatever lien the

⁴⁰¹ Wortham v. Boyd, 66 Tex. 401, 1 S. W. 109. In Stone v. Connolly, 1 Metc. (Ky.) 654, matters arising after the purchase were set up; but the court took the broader ground that every substantial amendment counts only from its date, relying on Dudley v. Price, 10 B. Mon. 84, where this is held as to limitation. Such is also the doctrine in Mitf. Eq. Pl. p. 400 (Brock v. Pearson, 87 Cal. 581, 25 Pac. 963, contra, does not indicate what the amendment was); Bradley v. Luce, 99 Ill. 234, contra. Amendment of bill to which demurrer has been sustained relates back. Cotton v. Dacey, 61 Fed. 481.

⁴⁰² Stone v. Connolly, supra.

⁴⁰³ Curtis v. Hitchcock, 10 Paige, 399; Clarkson v. Morgan, supra. In Jacobs v. Smith, 89 Mo. 675, 2 S. W. 13, one set of creditors having brought a suit to set aside a fraudulent conveyance, others joined in the suit, after purchase made. They were held not aided by the lis pendens.

⁴⁰⁴ Partridge v. Shepard, 71 Cal. 470, 12 Pac. 480; Tredway v. McDonald, 51 Iowa, 663, 2 N. W. 567.

attorney for either plaintiff or defendant may have upon such land, as the subject-matter of the controversy. The discussion of that lien, either at common law, if such there be, or under the several statutes, belongs elsewhere.⁴⁰⁵ Where a third person has, before suit brought, acquired the defendant's title by executory contract, and taken possession, it seems that he is entitled to be made a party to any suit setting up liens or equities against the same, and if he afterwards takes a deed so as to convert his own equity into a legal title, he will not be bound by a decree rendered against the original defendant only. This, also, where the purchaser had paid the whole price and holds a contract for a deed, though the land be wild and not capable of possession.⁴⁰⁶

Where, however, a mortgagee has, by foreclosure or by decretal sale, converted his mortgage into a fee while a suit was pending against his mortgagor, to which he had not been made a party, he cannot disregard the decree in his new capacity as owner, but he may do so in his quality of mortgagee, on which he may fall back.⁴⁰⁷ In like manner, a purchaser by executory contract will not be protected in the suit against his vendor, except to the extent that he has paid the purchase money before suit brought.⁴⁰⁸ The rights obtained by the *lis pendens*, without or with the statutory notice, are by no means the same which the English registry of assurance law, or the American recording laws, give to the grantee of a deed

⁴⁰⁵ *McCain v. Portis*, 42 Ark. 402; *Wilson v. Wright*, 72 Ga. 848.

⁴⁰⁶ *Parks v. Jackson*, 11 Wend. 442, in the court for correction of errors, the senators, led by Seward, reversing the chief justice and outvoting the chancellor; *Trimble v. Boothby*, 14 Ohio, 109; *Gibler v. Trimble*, Id. 323 (possession and equitable assignment of land warrants); *Walker v. Goldsmith*, 14 Or. 125, 12 Pac. 537; *Jackson v. Dickenson*, 15 Johns. 309 (purchase at sheriff's sale); *Lamont v. Cheshire*, 65 N. Y. 30 (holder of unrecorded deed of which plaintiff had notice); while in North Carolina "equitable notice" of an unrecorded deed is unknown, *Todd v. Outlaw*, 79 N. C. 235; *Banks v. Thompson*, 75 Ala. 531 (purchase relating back to levy of execution under which made). See, contra, *Snowman v. Harford*, 57 Me. 397. A holder under unrecorded deed must make himself party. *Dinsmore v. Westcott*, 25 N. J. Eq. 302.

⁴⁰⁷ *Lacassagne v. Chapuis*, 144 U. S. 119, 12 Sup. Ct. 659; *Randall v. Duff*, 79 Cal. 116, 19 Pac. 532, and 21 Pac. 610.

⁴⁰⁸ *Fisher v. Shropshire*, 147 U. S. 133, 13 Sup. Ct. 201; *Marshbanks v. Banks*, 44 Ark. 48.

or mortgage that is properly put to record. In other words, the plaintiff is not enabled, by the publicity of his suit, or by filing his notice in the recorder's office, to override former unrecorded deeds or prior equities, except in such states as North Carolina, in which the doctrine of "equitable notice" is unknown, and an unrecorded deed may be disregarded by a creditor having full notice of its existence.⁴⁰⁹

Among the kinds of "purchase" which are subordinate to the judgment in a pending suit are leases;⁴¹⁰ the acquisition of a mechanic's lien;⁴¹¹ a judgment against one party; or the obtention, by docketing in the proper office, of a judgment lien, upon a judgment entered before the *lis pendens* notice;⁴¹² and a purchase at a tax sale, in so far as the mortgagee plaintiff has a more lengthened right of redemption than the mortgagor.⁴¹³ Often the suit itself raises a lien, which would be gone by its dismissal. Such is the suit of a judgment creditor seeking to set aside a fraudulent conveyance (or otherwise supplementary to the judgment), which is considered as a kind of equitable execution;⁴¹⁴ and in those states in which a failing debtor is not allowed to make preferences among his creditors, a suit brought for the purpose of setting aside an attempted preference, and to distribute the estate among all the creditors,⁴¹⁵—in fact, any proceeding

⁴⁰⁹ *Wyatt v. Barwell*, 19 Ves. 439; *Story, Eq. Jur.* § 4069; *Newman v. Chapman*, 2 Rand. (Va.) 93; compare *Lamont v. Cheshire*, *supra* (see, contra, *Kindberg v. Freeman*, 39 Hun, 466); *Hammond v. Paxton*, 58 Mich. 393, 25 N. W. 321. In North Carolina, recording after suit brought is too late. *Collingwood v. Brown*, 106 N. C. 366, 10 S. E. 868. *Williams v. Kerr*, 113 N. C. 306, 18 S. E. 501.

⁴¹⁰ *Moore v. McNamara*, 2 Ball & B. 187; *Pickett v. Ferguson*, 45 Ark. 177.

⁴¹¹ *Hards v. Connecticut Mut. Life Ins. Co.*, 8 Biss. (U. S. C. C.) 234, Fed. Cas. No. 6,055.

⁴¹² *Ettenborough v. Bishop*, 26 N. J. Eq. 262; *Fuller v. Scribner*, 76 N. Y. 190; *Banks v. Thompson*, 75 Ala. 531.

⁴¹³ *Hawes v. Howland*, 136 Mass. 267. So, also, a railroad company taking condemnation. *Booraem v. Wood*, 27 N. J. Eq. 371.

⁴¹⁴ In Kentucky a judgment for money is not a lien; but a suit after return of *nulla bona*, naming property to be subjected, is. *Scott v. Coleman*, 5 T. B. Mon. 73; *Parsons v. Meyburg*, 1 Duv. 206.

⁴¹⁵ *Sawyer v. Langford*, 5 Bush, 541, shows how, under the Kentucky act of 1856, other than the petitioning creditors can intervene to keep the suit from being dismissed, and thus retain it as a lien upon all property subject to distribution under the law.

under the state insolvent laws;⁴¹⁶ and, what is more common and more important, in those states in which the decedent's land still goes direct to the heirs or devisees, as at common law, an administration suit, brought either by a creditor or by the personal representative, to subject the descended or devised lands to the payment of debts; or even a suit under the statute of fraudulent devises, by one or more creditors in their own behalf only, against the heirs or devisees.⁴¹⁷

One who obtains, during the pendency of the suit, rights in the land in contest, not from any party to the suit, but from the holder of the paramount title, or from a stranger, the owner of the legal title, without notice of the equity in contest between the parties, or from a purchaser not affected by notice, though having notice himself, is not within the rule of *lis pendens* for any purpose.⁴¹⁸ We are not here concerned with the practice laws of the several states which allow in many cases persons who acquire new rights during the pendency of a suit to be heard in it; for instance, those which provide for hearing together several suits in which attachments are levied consecutively upon the same land.

⁴¹⁶ Arnold, Petitioner, 15 R. I. 15, 23 Atl. 31.

⁴¹⁷ Scobee v. Bridges, 87 Ky. 427, 9 S. W. 299, decided in a state in which the land goes directly to the heir or devisee, not to the personal representative. See the distinction in chapter on "Title by Descent," § 28. The English statute on fraudulent devises, and its American copies, distinguish between alienation before and alienation after suit brought: in the latter case, the heir or devisee being personally liable for the proceeds of land sold.

⁴¹⁸ Douglas v. Davies, 23 Ill. App. 618; Travis v. Topeka Supply Co., 42 Kan. 625, 22 Pac. 991; Snowden v. Tyler, 21 Neb. 199, 31 N. W. 661; Allen v. Morris, 34 N. J. Law, 159.

CHAPTER XIV.

TITLE BY JUDICIAL PROCESS.

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Note on Tax Titles.

§ 161. Introductory.

Having in a previous chapter discussed the validity of judgments from which a title to land may flow, we must now examine the steps after a valid judgment or decree which, in connection therewith, are needed to transfer the fee or lesser estate from one person to another. We distinguish for our purpose two classes of judgments or decrees: Those which operate by their own force on the title, and those which do so only by ministerial action thereafter. Among the first are decrees of strict foreclosure, decrees to quiet the title, or declaring a deed between the parties void, or judgments in the writ of partition, and in some statutory proceedings that may be taken for that end. With these we have no further trouble. Among the judgments and decrees which require further steps before an estate in lands passes, the foremost in importance is a decree or order of sale; that is, the judgment of a court that a tract of land therein described be sold, either for the purpose of raising money for the payment of one or more debts; or for distribution among parties in interest. Next are decrees ordering the conveyance of land by its former owners or apparent owners to the party whose

equitable title thereto appears on the record; and these decrees or judgments follow every judicial sale, after it is reported, in the shape of an order of confirmation, which either impliedly or in express words directs a commissioner or trustee of the court, or an administrator or guardian, to make conveyance to the person who has been reported as the best bidder at the sale, whose bid has been approved, and who has complied with the terms of sale; and these orders of confirmation, though they are judgments most final in their nature, must be treated in connection with sales. Here belong also decrees in equity for partition, which (except in Virginia and Georgia) must, or at least may, be carried into effect by commissioner's deeds; decrees for the specific performance of contracts for the sale of lands, or for rescission and reconveyance.* Lastly come ordinary judgments for money upon which executions are issued. These are levied upon the land of the defendant, and the land is sold, or in a few states allotted to the execution creditor; or the mere lien of the execution may be enforced by a decree along with other incumbrances upon the defendant's lands.¹

The whole system of causing lands to be conveyed or sold by the order of court or under a judicial writ without the act of the parties is wholly foreign to the common law. The ordinary way for enforcing a money judgment was either an execution against the body, or a fieri facias, under which only goods and chattels could be taken. Even under an extent in favor of the crown, under an elegit or levari facias, as authorized by some of the older statutes, only profits of the land could be sequestered. Sales by courts of equity were also of slow growth. A first mortgage could in England, even towards the end of the eighteenth century, be only enforced by foreclosure; that is, by fixing a time after which the holder of the mortgage, in default of redemption, would become the absolute owner, even when the equity of redemption had been cast on an infant heir, who could not raise the money by private sale, and

* Connecticut, Gen. St. § 810, enables courts sitting in equity to pass title in land by decrees.

¹ The sale of land (by setting it over to the plaintiff) seems, in Connecticut, to have been much older than the statutes of 5 Geo. II. In *Spencer v. Champion*, 13 Conn. 11, the form of the execution is traced back to 1702, perhaps to 1673.

was thus often subjected to great loss.² Sales were, however, decreed for a long time in favor of those holding junior or other equitable mortgages, in the enforcement of vendor's liens, or of charges put upon land by will or deed of trust;³ and assignees in bankruptcy would sell the lands vested in them by the commission. The American states have, with few exceptions, abolished foreclosure altogether,⁴ and have otherwise greatly extended the field of judicial sales. These are now ordered not only in the enforcement of mortgages, vendors' liens, and express trusts, but also of mechanics' liens and other statutory charges; also in lieu of partition in kind, and for the purpose of converting the lands of infants or other persons under disability into money; in administration suits, when lands are needed for the payment of debts and legacies; and lastly in the enforcement of the tax lien, including "assessments for benefits," which is now carried on in many states under judicial forms, where formerly ministerial sales were alone resorted to. The land tax or the "rates" in England are enforced by distress, but the great bodies of "unseated" or wild land and of unimproved town lots have made distress alone an insufficient remedy, and the clumsy and crude method of tax sales has taken its place often where distress would be ample and efficient.

² While the Irish court of chancery, from an early day, ordinarily decreed a sale rather than the foreclosure of mortgages, the English practice was the other way; and the first precedent for decreeing a sale against an infant heir, simply to save him from a sacrifice of an estate worth more than the mortgage debt, was set by Lord Eldon, in 1813, in *Mondey v. Mondey*, 1 Ves. & B. 223. The grounds on which sales were decreed by the English chancellor in place of foreclosure are stated by Story, Eq. Jur. § 1026, under nine heads.

³ See Story, Eq. Jur. § 1060 (enforcement of trusts); section 1217 (enforcement of liens). In enforcing trusts by sale, the court began by appointing trustees in place of those who had died or declined to act, before selling through its own officers. In Maryland and Pennsylvania, the statute still speaks of the commissioners to conduct decretal sales as "trustees."

⁴ Connecticut has, by an act as late as 1887 (now section 3023, Gen. St.), authorized the courts, in their discretion, to decree a sale instead of strict foreclosure. New York, Code Civ. Proc. § 2387, misapplies the word "foreclosure" where a sale is meant. In Kentucky, Code Prac. § 375, the words of the Code of 1851 are reproduced: "Foreclosure of a mortgage is forbidden." In Pennsylvania a scire facias, in Delaware *that* or *levari* facias, is the remedy, always by sale. Foreclosure is unknown. See, on the other hand, Connecticut, Gen. St. § 951, for a strict foreclosure on petition.

Executions for money can now be levied on land in every state (and in most of them the judgment in itself, or when docketed in a prescribed way, becomes a lien on the defendant's land), though in late years their force has been much lessened by very liberal homestead exceptions; and sales of land are, moreover, hampered by rights of redemption which discourage any one but the creditor from bidding, and still more by the utter lack of any guaranty of title, the bidder at the sale getting only the title of the execution debtor, such as it is, without any previous determination upon conflicting rights. Hence purchases on execution are avoided; and it is the experience of every lawyer who is in the habit of examining titles that many more estates pass through decretal sales than through sales under fieri facias. In many states, however, the Code of Procedure calls the order issued to an officer to sell a tract of land adjudged to be sold a "mortgage execution," while under the older practice a commissioner of the court is simply furnished with a copy of the decree under which he sells. The commissioner's deed is also a plant of late and of slow growth. Formerly the courts of equity acted in personam, or, as the phrase went, "upon the conscience of the defendant." Hence, when it seemed equitable that A.'s lands should pass to B., A. would be decreed to convey them, and the decree would, in case of disobedience, be enforced by process of contempt. This process would often fail, and thereupon the court might order a commissioner to execute a deed on behalf of the defendant. In like manner, in case of a sale, the parties would be ordered to convey to the purchaser; and only on their failure to do so the master would convey on their behalf. The parties being often very numerous, their action could not be expected, and a commissioner's deed would be ordered in the first instance.⁶ There is now no gen-

⁶ The author, in his Kentucky Jurisprudence (page 264), thus illustrates the slow growth of the commissioner's deed in this country: "A Virginia act of 1776, which confers the legal title of those who hold under a sheriff's or commissioner's deed, in pursuance to a judgment or decree, is retrospective only. An act of 1785 authorized guardians and commissioners to execute deeds upon decrees for title against infants and persons of unsound mind. A Kentucky act of 1795 allowed the county court, upon request of the personal representative of one who had sold land within its county by executory contract, to appoint "three fit persons" guardians of the infant heirs, with powers to execute deeds as contracted for. Such action was thought to be almost ministerial,

eral bankrupt law, but there are insolvent laws in many states, in which there is an "adjudication" or "surrender," which, as a judicial act, transfers the estate of the insolvent to the receiver or official assignee, from whom title is afterwards derived by such sale as he may make under the order of the court.

It should not be forgotten, that the acts which we shall consider in this chapter are in the main ministerial, the work of clerks and sheriffs; and in many cases do not enjoy the subsequent approval of a court; that they lack, therefore, that sanctity which hedges about a judgment, but stand or fall on their conformity to the law.⁷ An execution, not justified by the judgment which it purports to enforce,—e. g. one directed against all of the defendant's property (a *fieri facias*) when the judgment only condemns land therein described to be sold,—is clearly void.⁸ But executions and attachments have been assailed for want of form, and not always in vain,—e. g. for not running, as the constitution directs, in the name of the commonwealth, or for being tested and signed by the deputy clerk in his own name instead of his principal's.⁹ And though, in Indiana, where, as in most other states process issues under the seal of the court, the absence of the seal from an execution was excused, or thought to be capable of cure by amendment, it might be deemed fatal in some other state.¹⁰ But executions and attachments have been amended, not only as to such formalities, but in weightier mat-

and, unless closely following the law, invalid; while, where a superior court of equity prematurely ordered a commissioner's deed, it was barely error. *Nesbet v. Gregory*, 7 J. J. Marsh. 271. An act of 1802, enlarging that of 1795, enables the commissioners to convey the shares of the adults as well as those of the minors. Lastly, the act of February 16, 1808, in general words enables a court of equity to order deeds to be made in pursuance of its decrees, either when the defendant fails to comply with the mandate of the court, or is absent, or a nonresident."

⁷ "But the defect in this case occurs after the judgment, and is fatal to (the purchaser's) title; for purchasers at a judicial sale are not protected if the execution on which a sale was made was void." Supreme Court United States, in *Mitchell v. Maxent*, 4 Wall. 237, 242. The same idea had been expressed in *Woodcock v. Bennet*, 1 Cow. 711.

⁸ *Deakins v. Rex*, 60 Md. 593.

⁹ *Yeager v. Groves*, 78 Ky. 279.

¹⁰ *Warmoth v. Dryden*, 125 Ind. 355, 25 N. E. 433, quoting *Hunter v. Turnpike Co.*, 56 Ind. 213; *Rose v. Ingram*, 98 Ind. 276.

ters, such as altering the sums to be made from the defendant's estate to agree with the judgment; and this long after a sale had been made, and the writ returned, and while an ejectment to test the validity of the writ was pending.¹¹ Informalities, and in fact substantial flaws, in the sheriff's return, are more frequent than defects in the writ; but the danger of miscarriages from these is greatly obviated by the liberty in amending them; the sheriff or his deputy having been permitted to amend the return in accordance with the truth and in support of the validity of the action taken under the writ at almost any length of time after the return was made, and long after the expiration of their terms of service.¹²

§ 162. Judicial Sales.

A judicial sale confers on the purchaser (if the powers of the court permit it) the estate or interest of all persons who were made parties to the suit, and properly brought before the court,¹³ unless the judgment in the cause expressly guards the interest of some of the parties as being paramount to the claim upon which the sale is demanded, as happens often with dower or homestead right.¹⁴ These sales

¹¹ In *Hunter v. Turnpike Co.*, *supra*, where the seal was supplied by amendment, the power of amending the writ is traced back to St. 8 Hen. VI. c. 12. Executions amended by judgment, *Doe v. Rue*, 4 Blackf. (Ind.) 263; the divergence from the judgment is deemed clerical, *Hutchens v. Doe*, 3 Ind. 528. See 2 Tidd, Prac. 643; *Bissell v. Kip*, 5 Johns. 89; *Brown v. Betts*, 13 Wend. 29.

¹² *Dwiggins v. Cook*, 71 Ind. 579; *Turner v. First Nat. Bank*, 78 Ind. 19, quoting *Childs v. Barrows*, 9 Metc. (Mass.) 413; *Blaisdell v. The Wm. Pope*, 19 Mo. 157; *Moore v. Purple*, 3 Gilman (Ill.) 149; *Morris v. Trustees of Schools*, 15 Ill. 266; *Kitchen v. Reinsky*, 42 Mo. 427; *State v. Gibson*, 29 Iowa, 295,—mainly cases where the return of mesne process was amended. The modern codes of procedure confirm and enlarge the old powers of amendment.

¹³ Thus, Kentucky, Code Prac. § 397, says: "A conveyance made in pursuance of a sale ordered by the court shall pass to the grantee the title of all the parties to the action." New York, Code Civ. Proc. § 1242, is less comprehensive. The sale and deed under it carries only the interest of the party ordered to be sold. Still, the other parties to the suit would be estopped by the judgment from showing that those whose interest was ordered to be sold did not hold such an interest as the judgment ascribed to them.

¹⁴ This is particularly guarded in New York by Code Civ. Proc. § 1244. See hereafter under "Sheriffs' and Commissioners' Deeds."

are nearly always made to the highest bidder at public outcry, the English method of inviting sealed bids being almost unknown in America; and in the few states and rare cases in which such sales are had they are spoken of by the lawmakers and the judges as private sales.¹⁵ The court itself really does the selling. The master, or commissioner, or even the sheriff in those states in which the enforcement of decrees of sale is entrusted to him, is merely its agent for reporting bids, which become purchases only when approved.¹⁶ In Nebraska, sales under execution must also be reported and approved.¹⁷ Along with this English view of the "chancery sale" came over naturally the practice of "opening the biddings," which is, however, very little in use at this day. When a sale is reported, it is allowable under this practice for any stranger to notify the successful bidder that he will on a day named in the notice move the court to "open the biddings" by offering at least 10 per cent. more than the reported price, and give proper bonds to secure his compliance with the terms of sale. Such offers used to be accepted, though there was no fraud or irregularity in the sale or in the steps leading up to it. In short, under this practice, the successful bidder did not acquire even a *jus in rem* to the land offered for sale. This seems to be yet the practice in Virginia and North Carolina, but not in New Jersey, nor, generally speaking, in the "Code states," and no longer in Kentucky.¹⁸ The commissioner who conducts a sale is not the agent of either party, hence either party may, without special leave of the court, take part in the bidding (which is not the old English practice), and be reported as the highest bidder.¹⁹

¹⁵ As to English practice, see Daniell, Ch. Prac. 1264 et seq.

¹⁶ Dickerson v. Talbot, 14 B. Mon. 60; Campbell v. Johnson, 4 Dana, 186.

¹⁷ Nebraska, Consol. St. §§ 5032, 5033. See State Bank v. Green, 10 Neb. 134, 4 N. W. 942; Deputron v. Young, 134 U. S. 241, 10 Sup. Ct. 539.

¹⁸ Ewald v. Crockett, 85 Va. 299, 7 S. E. 386; Dula v. Seagle, 98 N. C. 458, 4 S. E. 540. Contra, Seaman v. Riggins, 2 N. J. Eq. 214; Cline v. Prall, 27 N. J. Eq. 415; Stump v. Martin, 9 Bush, 285. The advanced bid is known as an "upset bid," i. e. one set up beforehand, below which the new bidding cannot start. A decree often names a minimum price for the first sale, as in Pewabic Min. Co. v. Mason, 145 U. S. 349, 12 Sup. Ct. 887, where it was, however, held that the successful bidder had a right to have his bid confirmed, if it was fairly made. To the same effect is Morrisse v. Inglis, 46 N. J. Eq. 306, 19 Atl. 16.

¹⁹ Smith v. Arnold, 5 Mason, 414, Fed. Cas. No. 13,004,—the leading case;
(1212)

The commissioner himself of course must not buy or bid, neither directly nor indirectly through a third person, who, either before or after confirmation, transfers the bid or purchase, as the case may be, to him.²⁰ The court would, whenever the fact is brought to its notice, refuse to confirm a sale reported by its officer as made to himself, or to another for his benefit; but it does not follow that such a sale would be void if confirmed, for that could only happen on the supposition that the judgment of confirmation is itself void.²¹

When speaking of the grounds on which a judicial sale may be set aside when it has, in accordance with the old chancery practice, been first reported, then laid over for exceptions, and then confirmed, we must broadly distinguish between grounds for an attack before confirmation in the court to which the sale is reported and an attack after confirmation; especially when, by the expiration of the term, the court has lost control over its judgment, and when the attack must proceed either upon absolute voidness or upon fraud. An attack by exception, or by opposing the purchaser's motion to approve and confirm, belongs rather in a treatise on chancery practice than on titles to land.²²

Smith v. Black, 115 U. S. 308, 6 Sup. Ct. 50; Allen v. Gillette, 127 U. S. 589, 8 Sup. Ct. 1331. In Blossom v. Railroad Co., 3 Wall. 196, 208, it is admitted, that the commissioner may, and often does, act under the advice of the complainant's solicitor, though he is not bound to do so. And see last case in note 16.

²⁰ Howery v. Helms, 20 Grat. 1. The confirmation, when had, makes the purchaser's title relate back to the day of sale. Cale's Adm'rs v. Shaw, 33 W. Va. 299, 10 S. E. 637.

²¹ Newcomb v. Brooks, 16 W. Va. 32. Hence, a sale made by the plaintiff's solicitor as commissioner named for that purpose is not void, but only voidable, if assailed within a reasonable time. Walker v. Ruffner, 32 W. Va. 297, 9 S. E. 215.

²² "Before the approval of a judicial sale, a resale will be ordered, if fraud or misconduct in the purchaser, the officer conducting the sale, or other person connected therewith, is shown, or if it is made to appear that a party interested has been surprised, or led into a mistake, by the conduct of the purchaser, officer, or other person connected therewith. But courts will not refuse to confirm a judicial sale, or order a resale, on the motion of an interested party, merely to protect him against the result of his own negligence, where he is under no disability to protect his own rights at such sale." Barling v. Peters, 134 Ill. 606, 620, 25 N. E. 765. In this case, the contract of the successful bidder to bid at least a named sum, and, if neces-

After confirmation there is a judgment to overcome; and when the owner has, as either plaintiff or defendant, been actually before the court, either by appearance or by actual notice, the judgment of confirmation can only be gotten rid of like other judgments, by re-

sary, to go up to a certain other and higher sum, having been kept secret, was not deemed improper, or a ground to open the sale. *Herndon v. Gibson*, 38 S. C. 357, 17 S. E. 145, is a somewhat irregular proceeding,—a separate suit to set aside a sale before it was confirmed. A widow's requesting the bystanders not to bid against her, and thus getting the land at one-third its value, was the ground for vacating the sale (following *Carson v. Law*, 2 Rich. Eq. 296). *Fidelity Trust & Safety-Vault Co. v. Mobile St. Ry. Co.*, 54 Fed. 26,—exceptions to report: held, that it is not improper for committee of bondholders, i. e. parties in the same interest, to combine (so, where two sisters bought jointly. *Reagan v. Bishop*, 25 S. C. 585); nor unfair for them to keep secret the amount they are willing to bid. *Gibson v. McLaurin*, 90 N. C. 256, shows a usage in North Carolina to open biddings at an advance of 10 per cent. refused here, for defendant's misconduct. In Kentucky, by the decision of the court of appeals in *Stump v. Martin*, 9 Bush, 285, the custom until then prevailing in the Louisville chancery and some other courts of the state was broken up, as unauthorized (see, also, *Beam v. Johnson* [Ky.] 16 S. W. 140). And inadequacy of price alone, unless so gross as to indicate fraud or surprise, is no longer a cause to withhold confirmation. Only a few of the states keep up the practice of opening a sale upon an advance. It is still in vogue in many of the United States circuit courts as part of the practice of the high court of chancery as it stood at the time of the promulgation of the rules in equity, in 1844. And a recent example is found in *Re Herr's Estate*, 12 Pa. Co. Ct. R. 622. Misunderstandings which have led to a sacrifice are often deemed a sufficient ground for setting aside a sale. *Van Arsdalen v. Vail*, 32 N. J. Eq. 189. Want of compliance with the law which regulates sales under judgment,—e. g. that the commissioners specially named to sell or the appraisers were not sworn (*Phelps v. Jones*, 91 Ky. 244, 15 S. W. 668); or that the land was not appraised, as the law required (see cases *infra*, note 23, from Nebraska); or that it was not advertised for the proper length of time, or in the right paper (*Miller v. Lefevre*, 10 Neb. 77, 4 N. W. 929, where the time was counted rather oddly); or several lots are sold as a whole, instead of separately (*Larkin v. Brouty*, 60 Hun, 585, 15 N. Y. Supp. 509; but see, contra, *Hopper v. Hopper* [Md.] 29 Atl. 611),—is always good ground for exception. The court may, if it find any unfairness or illegality in the proceeding, set the sale aside, but cannot modify the terms of sale, or put the purchaser on terms. *Ohio Life Ins. & T. Co. v. Goodin*, 10 Ohio St. 557; *Green v. State Bank*, 9 Neb. 165, 2 N. W. 228. Compare chapter on "Incumbrances," § 96, as to purchases made pretendedly for owner's benefit.

versal on appeal or review, or by suit to vacate for fraud, unavoidable accident, or similar grounds.²³ In Nebraska, Kansas, and the Dakotas, where sales under execution must be reported to the court, examined by it, and then approved and confirmed, the same doctrine is applied to these sales; that is, the confirmation cures almost all defects; certainly all irregularities.²⁴ When the defendant has been only constructively summoned, the process by warning or publication holds him in court, even to the confirmation of the sale; but courts will, if there was gross unfairness, more readily seek an opportunity for opening the sale.²⁵ Where an administrator sells by license, or an assignee in insolvency under the orders or with the consent of a probate court, the confirmation which succeeds, being ex parte, is not generally regarded as such a judgment as will prevent attacks upon the fairness of the purchase, though there might have been an opportunity to resist the confirmation. At least the attack need not take the shape of a direct proceeding to open the

²³ By the old English chancery practice the confirmation of the report of sale was not regarded as such a final decree as to stand in the way of the chancellor's discretion; but fraud or some equivalent were, after confirmation, to be shown to open the sale, while, before confirmation, a mere advanced bid was deemed enough. *Watson v. Birch*, 2 Ves. Jr. 51; *Prideaux v. Prideaux*, 1 Brown Ch. 287; *Morice v. Bishop of Durham*, 11 Ves. 57. In New Jersey, unless there are exceptions, the report is not confirmed, but in due time, unless forbidden, the sheriff makes a deed to the purchaser; and, when such deed is made, the sale stands on the footing of a confirmed sale in England, but may, upon sufficient grounds, be opened on petition (i. e. written grounds for motion) in the same case. *Campbell v. Gardner*, 11 N. J. Eq. 423. In South Carolina, also, under Code Civ. Proc. § 307, the master, when the terms of sale are complied with, makes title without any previous confirmation, to which it is deemed analogous. See *Leconte v. Irwin*, 19 S. C. 554 (it was held here that defendant cannot object that plaintiff's attorney bought for himself); *Allison v. Allison*, 88 Va. 328, 13 S. E. 549 (decree of confirmation to be set aside only for fraud, mistake, or surprise that would avoid a private sale). Where decretal sales are subject to redemption, a suit to vacate on account of irregularities shown by the record should not be delayed beyond the time for redemption. *Abbott v. Peck*, 35 Minn. 499, 29 N. W. 194.

²⁴ *Neligh v. Keene*, 16 Neb. 407, 20 N. W. 277; *Wilcox v. Raben*, 24 Neb. 368, 38 N. W. 844; *La Flume v. Jones*, 5 Neb. 256 (as to want of appraisement and other defects). The Kansas cases are very numerous.

²⁵ *Smith v. Huntoon*, 134 Ill. 24, 24 N. E. 971 (great inadequacy of price).

order of confirmation.²⁶ What is here said about inadequacy of price, suppression of biddings, and other irregularities in judicial sales, properly so called (that is, sales in pursuance of a judgment or decree directing sale of lands therein described), applies substantially to sales under execution, except in this: that in most states such a sale is not confirmed, and that, therefore, no judgment of a court stands in the way of equitable relief. A fair price is more rarely gotten under an execution than under a judicial sale; hence, unless the disproportion is most shocking, the courts will hardly ever interfere on such a ground alone; and when it is such, a fraudulent purpose can hardly be concealed. It will be found with him (often, be it said to our shame, a lawyer) who had the management of the execution.²⁷

The right to object to a sale by the master before it has been confirmed, or to open a confirmation during the term, while the court retains control over its orders, belongs as much to the highest bidder, who on good grounds refuses to comply with the terms of sale, as to the parties who are dissatisfied with the bid. It is the understanding in every chancery sale that the purchaser buys a good title, unless the decree shows on its face that only the estate of named parties is sold, or that the land is sold subject to incumbrances stated in the decree. After the highest bidder has made the required deposit, or has otherwise complied with the preliminary terms, or when he refuses to do either, steps are often taken against him to compel his compliance, and again after a report of sale and before confirmation, he is supposed to examine the title to the land for which he has bid, both as it stands before suit brought and as affected by the proceedings in the suit; and if on either ground the

²⁶ *Saxton v. Seiberling*, 48 Ohio St. 554, 29 N. E. 179 (attack by creditors on deed by assignee approved by the probate court, by original suit in a court of equity); *Barnes v. Mays*, 88 Ga. 696, 16 S. E. 67 (suit by administrator to vacate his deed against purchaser who had bought off a rival).

²⁷ *Parker v. Shannon*, 137 Ill. 376, 27 N. E. 525; *Byers v. Surget*, 19 How. 303. An arrangement between the sheriff and a bidder, that he need not pay till the time of redemption expires is not a fraud of which the defendant can complain, if credit is given him for the bid when made. *Cooper v. French*, 52 Iowa, 531, 3 N. W. 538. The recent case of *Daly v. Ely*, 26 N. J. Eq. 263, 26 Atl. 263, shows how these sales at shockingly low prices are almost always the result of deliberate fraud.

court cannot give him such title as the decree and the notice of sale given thereunder purport to promise he may resist a rule seeking to enforce compliance, or may except to the report of sale. As it was well said by a great American chancellor, the court will not compel a bidder to proceed with his purchase where a private seller could not compel a buyer to proceed, and will not allow any deception on the purchaser to prevail.²⁸ But after the sale is confirmed, and the court has, by the expiration of the term (time analogous to a term), lost control over the order of confirmation, the purchaser can only obtain relief on such grounds as it would be given against him. If the court had no jurisdiction, either for want of the service of process or because special proceedings were not carried on in substantial compliance with a statute (this often happens in proceedings to sell the lands of infants or lunatics), in short, if the judgment of sale is void, and the purchaser cannot sustain his possession under it against the very parties whose title he is supposed to have bought,

²⁸ In *Norton v. Nebraska Loan & Trust Co.*, 35 Neb. 466, 53 N. W. 481, the majority of the court take the utterly untenable position that the bidder should look up the papers in the case before making his bid. This might have been done in that case, where there was no competition; but it would utterly defeat weekly or monthly auctions at the courthouse door, where crowds of buyers assemble regularly to bid for whatever may offer, as they are found at chancery sales in the larger cities. The highest bidder is expected to look into the papers and to examine the title before the sale is confirmed. Afterwards, he can, during the term, move to open the confirmation on special grounds (which existed, in the above case, in the misconduct of the sheriff, acting as master, who not only misinformed him as to the state of the title, but threw him off his guard, and kept him from objecting to the report of sale). The dissenting opinion of Maxwell, C. J., takes the true ground. The position of the text is sustained by the cases of *Veeder v. Fonda*, 3 Paige, 97; *Post v. Leet*, 8 Paige, 337; *Seaman v. Hicks*, 8 Paige, 656; *Smith v. Brittain*, 3 Ired. Eq. 347,—all of which he quotes. In the first of these cases, a 13-acre farm had been sold, with the knowledge of the parties in interest, for 20 acres, "more or less." The propriety of opening a confirmation, on good grounds during the term is affirmed in *Niles v. Parks*, 49 Ohio St. 370, 34 N. E. 735. In *Eccles v. Timmons*, 95 N. C. 540, an objection for defect of title shown by the pleadings was made long after the sale, and after part payment, and thus came too late; for the bidder had long had an insight into the record. The following cases are also cited: *Kauffman v. Walker*, 9 Md. 229; *Merwin v. Smith*, 2 N. J. Eq. 182; *Hodgson v. Farrell*, 15 N. J. Eq. 88.

the better opinion is that he may have the sale vacated even when confirmed. Many of the cases cited in a former chapter of judgments for the sale of land being declared void arose over attempts to compel purchasers, after confirmation of the report of sale, to pay the sale bonds given to the master; and the sale being found void, they were discharged.³⁰ But where the sale is within the jurisdiction of the court, but the title sold is defective (no matter how grossly), the maxim of *caveat emptor* applies as fully as if the parties to the suit owning the land, or holding interests therein or liens thereon, had joined, without fraud, in a conveyance to the purchaser, without warranty or covenant of title. The purchaser must submit to the loss.³¹

A sale may be irregular by being premature. Thus, in Wisconsin, a sale under decree of foreclosure must not be made within a year from the day when it is entered, and sometimes, by arrangement between the parties, or on equitable grounds, it is ordered that no "copy for execution" or other process shall be taken out till after a stated length of time. Whether a sale made under a process issuing before the time limited by law or by the judgment is void or only voidable is a point on which the authorities, both direct and indirect,—that is, either as to judicial sales proper or as to general executions,—are not fully agreed. Certainly, a point should not be strained to annul a sale otherwise fair; and, if the order or process was issued too soon, but the sale did not actually take place till it might have been lawfully reached, it will be held good on collateral attack.³¹

³⁰ See chapter 13, §§ 150, 151, 156. A good instance is *Barrett v. Churchill*, 18 B. Mon. (Ky.) 390.

³¹ *Megowan v. Pennebaker*, 3 Metc. (Ky.) 501 (outstanding dower). The distinction between compulsion before or after confirmation is made in *Laverty v. Chamberlin*, 7 Blackf. (Ind.) 356. *Anderson v. Foulke*, 2 Har. & G. 346 (sale ratified). In *Ex parte Browning*, 2 Paige, 64, the chancellor, after having confirmed a sale made by special guardian, under order of court, passed on the sufficiency of the title, and compelled the purchaser to take. This was in 1830. At present, few courts would entertain the objections after confirmation; and there is a suspicion that, even then, the objection would have been overruled, as coming too late, but that both parties agreed to raising the point of title, in order to get some evidence in its favor on the record.

³¹ See *Andrews v. Welch*, 47 Wis. 132, 2 N. W. 98, where it was held that the
(1218)

A judgment to sell for the payment of debts may be drawn in one of two forms: Where the statute does not give to the court the power to sell a parcel of land as a whole, the court will order its master or other officer to sell "so much of said parcel as will be sufficient to raise said amount"; while many of the recent statutes enable the courts to order the sale of the whole of a named parcel whenever it "cannot be divided without materially impairing its value." Now if, under a judgment of the former kind, the master or sheriff sells a parcel under lien for more than the amount to be raised, he has sold more land than he was authorized to sell; and, as his action is a unit, and cannot be separated, it must be deemed altogether void; and such are the older cases under decrees of sale, as well as under executions.³² Some courts have, however, found a way out of this conclusion by insisting that the proper time for the defendant to complain of the unauthorized action of the officer should have been when the report of sale lay over for exceptions; as the confirmation of the sale is the final judgment on the legality of the sale in all respects.³³ That the wrong person carried on the sale as referee or master is good ground for the parties to the suit to except to the report of sale, but is waived by them when they allow the sale to be confirmed. Hence the purchaser cannot except on this ground, for his title after confirmation will not be affected by

12 months count from the day when the judgment is perfected by inserting the taxation of plaintiff's costs; but the proceeding was direct, and before sale. In *Cross v. Knox*, 32 Kan. 725, 5 Pac. 32, a sale made under an order issued before the proper time was held voidable only. *Penniman v. Cole*, 8 Metc. (Mass.) 496, is referred to (case of premature execution; held void); contra, *Lynch v. Kelly*, 41 Cal. 232,—cases on executions, which will be referred to under the proper head. A delay in selling for any time within the limit when the judgment becomes dormant, or a delay as to one parcel after another has been sold, renders the sale neither void nor, if otherwise fair, voidable. *Hamer v. Cook*, 118 Mo. 476; 24 S. W. 180. Where the decree fixes the day of sale, a sale on any other day may be set aside on complaint before confirmation. *Tompkins v. Tompkins*, 39 S. C. 537, 18 S. E. 233.

³² In New York a sale of the whole property may be ordered by the court on the joint application of all parties. *Barnes v. Stoughton*, 10 Hun, 14. In Kentucky, under section 694 of the Code of Practice, the court determines whether or not the land can be divided without materially impairing its value.

³³ *Dawson v. Litsey*, 10 Bush, 410, carrying out the Kentucky doctrine that the confirmation is a final judgment.

the irregularity.³⁴ In those states in which the law honestly aims to obtain a fair price at judicial sales, there is generally a provision for paying all taxes in arrear (or even the taxes for the current year) out of the purchase money. It is so in New York, in Maryland, in Tennessee, in Kentucky, as to the courts of its most populous county, by plain words of the statute. In the absence of such a provision, it would seem that the purchaser must take the title such as it is. The purchaser has no right, as against the parties to the suit, to pay taxes which, by lapse of time, or on other grounds, are not enforceable.³⁵

§ 163. Sales by License.

The judgment known as the "license" has been discussed in a former chapter, together with the condition which is either expressed or implied in that judgment, of the oath and bond, which must precede the sale. We come now to the sale in execution of the license, and will find that the sale by the administrator or guardian is viewed in a somewhat different light from a decretal sale, which a court, especially a court of equity, conducts through its commissioner.³⁶ The sale under license is much more the act of the fiduciary than of the probate court. Much less weight is attached to the report and confirmation than where a commissioner sells under

³⁴ Eaton v. White, 18 Wis. 517; Abbott v. Curran, 98 N. Y. 665.

³⁵ New York, Code Civ. Proc. § 1676; Kentucky, Code Civ. Proc. § 773 (only as to Jefferson county), now St. Ky. 1894, § 989 (as to all courts in continuous session); State v. Hill, 87 Tenn. 638, 11 S. W. 610 (purchaser may apply for order ascertaining taxes); Perkins v. Gaither, 71 Md. 134, 16 Atl. 534 (no taxes paid that are barred by time); Gay v. City of Louisville, 93 Ky. 349, 20 S. W. 266 (to be proved like other claims). For lack of such provision the purchaser has no remedy but to throw up his purchase before confirmation if he finds the arrears too heavy (*Farmers Bank v. Peter*, 13 Bush, 591), on the ground, quoted from Rorer on Judicial Sales (section 168), that there is no warranty in a judicial sale,—one of those fine-sounding but pernicious maxims, which it is the part of a wise lawgiver to modify.

³⁶ The statutes on license to administrators and executors and to guardians and committees are referred to in notes to sections 149–151 of the preceding chapter, and the clauses which regulate the manner of advertising the sale, conducting, reporting, and confirming it, will be found closely following upon those on the obtention and terms of the license.

decree.³⁷ Hence, the fiduciary himself cannot be a purchaser, either in his own name or indirectly through another who buys in trust for him or who transfers the bid or purchase to him either before or after confirmation, and it will be found that, in almost all the states in which the "license" is known, purchases by the administrator or guardian (except when the latter buys for the benefit of the ward), whether direct or indirect, are declared void by statute, and the weight of decisions teaches us that "void" is meant here in its literal sense;³⁸ so that a court of law may treat the purchase as null in the hands of a purchaser from the fiduciary who thus buys at his own sale or at a sale made by himself and his colleague.³⁹ Nor can any one whose interest is on its face at one with that of the licensed seller, such as his wife or his attorney of record in the proceedings leading to the sale, gain a title as purchaser and transfer it to others, as all the world has notice of the defect.⁴⁰ In Tennessee, though the sale is ordered by a chancery court and carried out by its master, yet the statute which permits the land of infants or persons of unsound mind, or settled estates owned in part by those yet unborn, to be sold, guards their interests by forbidding a purchase by all those who had a hand in bringing about the sale, i. e. the

³⁷ Especially in the older cases, e. g. *Stall v. Macalister*, 9 Ohio, 19 (no longer applicable in Ohio).

³⁸ The Michigan statutes (section 6042) declare any purchase made by the administrator, etc., directly or indirectly, or in which he is interested, void. *Beaubien v. Poupard*, Har. (Mich.) 206 (resale ordered); *Dwight v. Blackmar*, 2 Mich. 330 (void at law; very elaborate, full in authorities to its date); *Wright v. Campbell*, 27 Ark. 637; *Mock v. Pleasants*, 34 Ark. 63; *Williams v. Walker*, 62 Ill. 517 (set aside as of course); *Coat v. Coat*, 63 Ill. 73 (sale set aside, land to be resold). But in Texas a purchase on behalf of the administrator can only be assailed by direct attack of the parties interested. *Rutherford v. Stamper*, 60 Tex. 447; *Dodd v. Templeman*, 76 Tex. 57, 13 S. W. 187; *Halbert v. Heirs of Young* (Tex. Sup.) 6 S. W. 747 (bona fide purchaser from improper purchaser protected). Third person buying for guardian, the latter cannot release the lien for purchase money, *Willey v. Tindal*, 5 Del. Ch. 194.

³⁹ *Dwight v. Blackmar*, supra. Cf. *McKay v. Williams*, 67 Mich. 552, 35 N. W. 159 (sale by attorney in fact not under license). Contra, *Obert v. Obert*, 12 N. J. Eq. 427; *Runyon v. Newark India Rubber Co.*, 24 N. J. Law, 475.

⁴⁰ *West v. Waddill*, 33 Ark. 575. Contra, *King v. Cabaniss*, 81 Ga. 661, 7 S. E. 620 (bona fide purchaser from executor's wife holds). See, for facts on which purchase is set aside, *Borders v. Murphy*, 125 Ill. 577, 18 N. E. 739.

guardian, his attorney, and a witness on whose testimony as to its necessity the sale has been decreed. A sale to any of these would confer no title.⁴¹ This is, indeed, a drawback to the system, as the administrator or executor is very often a party in interest and closely akin to the others, and ought to have an opportunity to bid. As the probate judge will have to pass on the sale when reported to him, a purchase by him is also forbidden and, it seems, null and void, for he must not be a judge in his own case; and purchasers from any of these excluded purchasers would stand no better than their grantors.⁴²

Though the statutes regulating these licenses always provide for a report of the sale and for its approval by the court from which the license goes forth, there is a tendency in many of the cases to make light of this approval or confirmation, and to recognize an administrator's or guardian's deed, as conferring rights before or without any formal confirmation.⁴³ The healing clause of the Indiana statute, heretofore noted, tacitly acknowledges the effect of an unconfirmed sale, for when certain conditions are fulfilled, the sale to a purchaser in good faith is made good, if carried on according to law, though

⁴¹ *Starkey v. Hammer*, 1 Baxt. 438 (when under the statute). But the guardian may buy at a sale under the general jurisdiction. *Elrod v. Lancaster*, 2 Head, 572. A witness who testifies what price he has agreed to bid, is not excluded. *Hunt v. Glenn*, 11 Lea, 16.

⁴² *Livingston v. Cochrane*, 33 Ark. 294; *Howell v. Duke*, 40 Ark. 102; *Walton v. Torrey*, Har. (Mich.) 259 (probate judge having become purchaser, resale was ordered, with his bid as the "upset bid"). But where one of three justices of the probate court was the purchaser, after long lapse presumed that he did not sit. *Price v. Springfield Real Estate Ass'n*, 101 Mo. 107, 14 S. W. 57. A sale to an appraiser was held void in *Reno v. Hale* (1890) 28 Neb. 646, 44 N. W. 996.

⁴³ *Jones v. Manly*, 58 Mo. 559 (approval of guardian's deed deemed a confirmation of sale), and *Castleman v. Relfe*, 50 Mo. 583 (which held a confirmation at the first term after the sale to be void), are overruled in *Henry v. McKerlie*, 78 Mo. 416. The approval of the sale is "gathered" from the acts of the court. *Grayson v. Weddle*, 63 Mo. 523. An executor's deed is presumed from lapse of time. *Long v. Joplin Mining & Smelting Co.*, 68 Mo. 422. In passing on the reported sale, the court cannot go behind the license, *Allen v. Shepard*, 87 Ill. 314; unless it appears to have been made without jurisdiction, when the sale must be set aside, *Spellman v. Dowse*, 79 Ill. 66. In Iowa, an unconfirmed sale or mortgage of infants' lands is void. *Ordway v. Smith*, 53 Iowa, 591, 5 N. W. 757; *Dohms v. Mann*, 76 Iowa, 723, 39 N. W. 823.

not confirmed; while in an ordinary decretal sale the confirmation is decisive, so that any defects in the advertisement or conduct of the sale are cured by its confirmation.⁴⁴ And by the Michigan healing clause, which is followed in Wisconsin and other states, both compliance with the law for conducting the sale and confirmation are demanded.⁴⁵ Yet this confirmation is a judicial act, subject to appeal, and it may be denied where the reported sale is unfair; e. g. if a bid less than the highest should have been reported.⁴⁶

A long delay between the license and sale is not a badge of fraud, nor an indication that the debts are paid, especially if orders extending the time are made from time to time.⁴⁷

The conduct of the sale, aside from its being public or private, embraces such notice of time and place as must, under the statute, be given, the appraisal, and the terms, whether cash or credit.⁴⁸ Several states have wisely ordained that a public sale under license shall be conducted in all things like a sale of land under execution.⁴⁹ In other states the length of time for posting the notice at so many of the most conspicuous places in the county, or in the township or ward, and the number of weeks, during which the notice must be printed in a newspaper published in the county, or in such newspaper as the court may name in its order, is separately prescribed for sales of this character.⁵⁰ The printing for a number of weeks means, as we have remarked in speaking of orders of publication by way of constructive summons, a newspaper publication once a week, for these laws had their origin when hardly any but weekly papers were

⁴⁴ See preceding chapter, § 150, note 198.

⁴⁵ See same section, note 203.

⁴⁶ In *People v. Wayne Circuit Judge*, 19 Mich. 296, it was held that a guardian's sale must be confirmed. A mandamus was refused because the bidder had not tendered the price.

⁴⁷ *Bowen v. Bond*, 80 Ill. 351. But see same section, "New England States." We have shown in a former chapter that in some states the license only holds good for one year or some other time fixed by statute.

⁴⁸ In sections 150-152 of preceding chapter the states have been generally indicated in which a private sale may be licensed.

⁴⁹ E. g. New York, Code Civ. Proc. § 2772; Iowa, St. § 2393.

⁵⁰ Michigan, § 6040 (posted in three public places in township or ward, and printed in newspaper for six weeks); Illinois, c. 3, § 108 (posted and printed for four weeks).

known.⁵¹ There has been some contrariety of opinion as to this: Must the last publication appear within a week of the sale, or is the publication for the number of times required by law sufficient, though more than a week elapse between the last newspaper notice and the sale?⁵²

Beside the healing clauses which secure the purchaser under license against the "heirs" or the "ward," respectively, the northwestern states in another clause confirm his title, if under license from a competent court, against a mere stranger, though the sale was irregular or unfair; that is, only the parties in interest, not a trespasser or intruder, can take advantage of any such irregularity or unfairness.⁵³

Generally speaking, the sales under license, being intended to bring about a speedy settlement of an estate, and, in the case of a ward's lands, not being always intended for the payment of debts, do not fall under the policy of the law which, from an often misjudged favor to the debtor, allows him time for redemption; but the successful bidder is entitled to a completion of his purchase.⁵⁴ The confirmation is generally coupled with an order for a deed, and with or without such formal order it vests in the purchaser an equitable title to the land, which is within the statute of frauds and cannot be aliened by parol, and which can be enforced against the heirs or the ward as the case may be, if the deed cannot be obtained.⁵⁵ But where the law fixes a certain rule as to the validity of sales, and the sale reported is on its face illegal, it will not be aided by confirmation,—not, at least, where the proceedings are in a probate court. Thus, many states direct that land to be sold by a guardian under license shall

⁵¹ See chapter 13, § 147, note 118 et seq.

⁵² Wilson v. Northwestern Mut. Life Ins. Co., 65 Fed. 38; In re North Whitehall Tp., 47 Pa. St. 156; Boyd v. McFarlin, 58 Ga. 208.

⁵³ Michigan, St. § 6078 (under executor's sale), § 6104 (under guardian's sale); Marvin v. Schilling, 12 Mich. 360; Curtis v. Campbell, 54 Mich. 340, 20 N. W. 69. And there are similar clauses in Indiana and Wisconsin. Title does not pass till confirmed. Harrison v. Ilgner, 74 Tex. 86, 11 S. W. 1054.

⁵⁴ Maxwell v. Smith, 86 Tenn. 539, 8 S. W. 340. Compare what is said as to judicial sales ordered for purposes, other than paying debts, in the preceding section.

⁵⁵ Webb v. Ballard, 90 Ala. 357, 7 South. 443; Sherwood v. Baker, 105 Mo. 472, 16 S. W. 938.

be appraised, and no sale shall be approved unless three-fourths of the appraised value has been realized. A sale made at a lower price was held void, though it had been confirmed; and without such a rule, minors would too often be despoiled of all their substance.⁵⁶

Although those holding incumbrances under the heirs or devisees are, under the laws governing the administrator's license, not generally made parties to the proceeding in which the license is obtained, the sale cuts off their claims, and they are thrown back on the purchase money, unless collusion or fraud against such incumbrancers can be shown.⁵⁷

§ 164. Purchase as Affected by Reversal, Etc.

We assume that there has been a valid judgment. This has been followed by a decretal sale, so far fair and regular that the highest bidder has acquired rights. Say his bid has been complied with by the payment of a deposit, perhaps by payment of the whole price, either in cash or in sale bonds secured by lien; and we may (as confirmation follows generally very closely upon the report of a sale) assume that the bid has by confirmation ripened into a purchase. Now, however, the judgment ordering the sale, after sale had and best bid made, is set aside, either by reversal upon error or appeal, or upon bill of review, where that practice still prevails (or its modern substitute, a proceeding to vacate); or, when a defendant who was only constructively summoned is allowed to open the decree or judgment rendered against him, within the time allowed by statute, which varies, in the several states, from one to seven years. The judgment being reversed, vacated, or "opened," what is the position of the purchaser?

What has been said here of judicial sales, properly so called, will apply with equal force to executions, except that the question arising upon execution sales is simpler; for the judgment can have been reversed only on the ground that the defendant in the execution does not owe the debt, not because the land sold is not subject to the demand against him. There is, therefore, somewhat more reason

⁵⁶ Missouri, Rev. St. § 5308; Carder v. Culbertson, 100 Mo. 263, 13 S. W. 88. See similar statutes.

⁵⁷ Myers v. Pierce, 86 Ga. 796, 12 S. E. 978.

for the retention of the land by the purchaser than where the purchase was had under an order of sale or special execution. Now, where some party other than the plaintiff is the purchaser,—an outsider,—and the sale is confirmed to him, or, in the case of an execution sale, if he has paid the amount of his bid, it is clear that the annulment of the judgment in any of the ways above indicated cannot affect him. The very distinction between a void and an erroneous judgment lies herein: that a sale under the latter is binding.

But it may be otherwise if the plaintiff in the judgment, or some one fully identified in interest with him, is the purchaser, paying for his bid by crediting it on the judgment. In the former case (that of a real outsider), the decisions are all one way,⁵⁸ except one in Kentucky, where the decree of sale had been reversed on the ground that the land condemned for the debt did not belong to the debtor.⁵⁹ In the other case, there is some diversity of opinion; but the general rule may be laid down that, whenever the plaintiff, or one standing in his shoes, paying his bid with the judgment, buys either under an execution or order of sale (or "special execution"), the sale falls to the ground when the judgment is reversed, vacated on review, or opened by the appearance and answer of an absent defendant and finally set aside.⁶⁰ The effect in the last-named proceeding, which is wholly statutory, is, in many of the codes of procedure or practice acts, set forth in a few words, of which the following provision, taken from the Kentucky Code of Practice, is a fair specimen: "The title of purchasers in good faith, to any property sold under an attach-

⁵⁸ *Whiting v. Bank of United States*, 13 Pet. 6; *Shultz v. Sanders*, 38 N. J. Eq. 154, affirmed, *Id.* 293; *Feger v. Keefer*, 6 Watts, 297 (retains "free from incumbrance"). We have, in a former chapter, seen (and, to same effect, in above case from 38 N. J. Eq.) that the opening of a decree by an infant after coming of age does not affect a purchaser. See discussion in *Wadham v. Gay*, 73 Ill. 415. For analogy of review to reversal, see *Little v. Bunce*, 7 N. H. 485, running back to *Manning's Case*, 8 Coke, 94b, sale of leasehold under fieri facias.

⁵⁹ *Miller v. Hall*, 1 Bush (Ky.) 229. (It is not cited in later Kentucky cases. But the purchasers were allowed a lien for what they had paid before the appeal was prayed, it being prosecuted without supersedeas.)

⁶⁰ *Reynolds v. Harris*, 14 Cal. 679. In *Jackson v. Cadwell*, 1 Cow. 644 (case of a sale on an execution that had been paid), the doctrine is discussed. *Hutchens v. Doe*, 3 Ind. 528 (see, also, *Rev. St. § 669*), by inference. *Steinbach v. Leese*, 27 Cal. 295.

ment or judgment shall not be affected by the new trial, &c., except the title to the property obtained by the plaintiff, and not bought of him in good faith by others." While the New York provision is in these words: "The title to property sold to a purchaser in good faith, pursuant to a direction in the judgment, or by virtue of an execution issued upon the same, shall not be affected thereby." The clauses in the laws of other states are substantially like the one or the other of these. But the plaintiff would probably not be considered a purchaser in good faith, within the meaning of the New York act or of those like it. In California, and other states of the far West, the right to open judgments "with no personal notice" is granted in very scant measure, on such terms as the court, in its discretion, will fix; and the rights of purchasers may be considered as sufficiently guarded.⁶¹

Where judgment is obtained against an absent defendant, and his land is sold, and the report of sale is confirmed, the confirmation is itself a judgment, and is subject to the same right of the defendant to open it within the length of time prescribed as the decree of sale itself,—only, however, on such grounds as affect the sale itself, e. g. that it was not conducted as the law prescribes, or that the order of confirmation did not reserve the proper length of time for redemption. The confirmation being opened, the sale falls to the ground; but the decree ordering it still stands.⁶² Reversals on error or review are much more frequent than new hearings for defendants condemned on constructive process. The judgment, whether it be personal or one subjecting the defendant's land to sale for debt, may be reversed or vacated, because the debt is found not to be justly owing. But the latter kind of judgment may also be set aside because the property is found not to be subject; that, in fact, it belongs to the appellant or petitioner for review,—that is, to a defendant in the

⁶¹ Kentucky, Code Prac. § 417; New York, Code Civ. Proc. § 445; Indiana, Rev. St. § 602 ("have passed into the hands of a purchaser in good faith"); Ohio, Rev. St. § 5356, to same effect; California, Code Civ. Proc. § 473 (no such provision); Michigan, § 6680. Sale and conveyance is protected; defendant may sue complainant for money. Wisconsin, § 2833. Massachusetts, c. 164, § 8, seems to exclude any recovery except of money. Illinois, c. 22, § 9, is silent.

⁶² Barbee v. Fox, 79 Ky. 594.

original suit other than the debtor. In the latter class of cases, the judgment subjecting the land, and its reversal, holding it not subject, bear a strong resemblance to the judgment in an ejectment or decree in equity for title and possession, with the reversal thereof on error or appeal; and the loss of the land to the true owner, who was unable to stay the sale by giving a supersedeas or appeal bond, is indeed a great hardship, but one which cannot well be avoided, without the risk of breaking up all judicial sales.⁶³

The distinction between a sale to the plaintiff and a sale to a stranger is nearly 300 years old. It was said that, where the profits of the defendant's lands or hereditaments are "set off" to the plaintiff under an elegend, and it is, upon error, quashed, there must be a restitution; while the title to chattels sold under a fieri facias would remain undisturbed, though the writ be quashed after the sale.⁶⁴ In the New England states, where land is still "set off" to the plaintiff on executions at law, the same result would naturally follow as under the elegend.⁶⁵ In many American cases, the distinction has been put on the plain ground that a party to whom a judgment has been awarded in the forms of law, but avowedly (as shown by the reversal) against the principles of law, cannot be allowed to retain any advantage from it,—as he would do if he had bought the defendant's land for less than its value, or if it had passed into the hands of a third party, and he, being insolvent, could not be made to refund the value.⁶⁶ Where the plaintiff's attorney bids in the estate, whether on behalf of his client or for himself, he stands no better than the plaintiff himself would, as he has like notice with the latter of all the weaknesses in the judgment; and, where the plaintiff bids in the name of his wife, paying the bid with his own

⁶³ The distinction is dwelt on in some of the Kentucky cases quoted in the notes to this section. And see *Dunnington v. Elston*, 101 Ind. 373, as to purchase after judgment for the land. Compare, also, section on *lis pendens* purchaser in preceding chapter.

⁶⁴ *Goodyere v. Ince*, Cro. Jac. 246.

⁶⁵ *Cummings v. Noyes*, 8 Mass. 434; *Delano v. Wilde*, 11 Gray, 17.

⁶⁶ *Marks v. Cowles*, 61 Ala. 299 ("the decree has ceased to exist between the parties"); *Steinbach v. Leese*, 27 Cal. 295 (plaintiff is "aware of all defects in his proceeding"). In *Wambaugh v. Gates*, 8 N. Y. 138, the loss of the purchase in the hands of the plaintiff is taken for granted.

judgment, by way of a gift to her, she stands in no better plight than he would.⁶⁷

The weight of opinion gives to a purchaser from the plaintiff no greater right to hold on to his purchase than he has himself; the estate gained by the plaintiff at a sale under an erroneous judgment being held in the light of a defeasible fee, which does not become absolute by being sold to a party ignorant of the defect.⁶⁸ Such being the general rule, exceptional cases will nevertheless arise,—such as, lately, in Illinois, where a sale on execution under a judgment, afterwards reversed, had been fortified by a decree in equity, which still stood unreversed.⁶⁹ Only in Kentucky and in North Carolina the distinction has not been recognized;⁷⁰ but, even here, the injustice of allowing an insolvent plaintiff to hold on to the land of persons never in his debt was, in some instances, so glaring, that the courts could not help awarding restitution.⁷¹

In Tennessee, the matter is settled by statute. When a judgment or decree is executed by sale, "before the writ of error is obtained and supersedesas granted," the rights of the purchaser cannot be affected by reversal. The word "purchaser" is held to mean "purchaser in good faith and for a valuable consideration"; but, in view of the opinion expressed, that this statute is in affirmation of the common law, and of the decisions in North Carolina on that law, this definition cannot well exclude parties to the suit from its benefits.⁷² Iowa, by statute, says that "Property acquired by a purchaser in good faith, under a judgment subsequently reversed, shall not be affected by such reversal." The plaintiff, or his attorney, who buys

⁶⁷ Ivie v. Stringfellow's Adm'r, 82 Ala. 545, 2 South. 22; Hays v. Cassell, 70 Ill. 669.

⁶⁸ Bryant v. Fairfield, 51 Me. 149 (though "without notice of the defect"); Jackson v. Cadwell, *supra*; Marks v. Cowles, *supra*.

⁶⁹ Gould v. Sternburg, 128 Ill. 510, 21 N. E. 628.

⁷⁰ Bickerstaff v. Dellingler, 1 Murph. 272 (insists on the distinction between elegit and fi. fa. as the only tenable one); Parker v. Anderson, 5 T. B. Mon. 445 (purchase by defendant); Clark v. Farrow, 10 B. Mon. 446; Gossom v. Donaldson, 18 B. Mon. 230; Yocum v. Foreman, 14 Bush, 494.

⁷¹ Baker v. Baker, 87 Ky. 461, 9 S. W. 382 (distinction between error in debt and error as to liability of land discussed).

⁷² Tennessee, Code, § 3906; Lewis v. Baker, 1 Head (Tenn.) 385; Anderson v. Ammonett, 9 Lea, 1.

while an appeal is pending, and with knowledge thereof, does not acquire the property in good faith; but, where the plaintiff purchases before appeal, and, after a reversal and procedendo, again recovers the same judgment as before, his purchase will stand. Perhaps it would have stood, even if he had purchased after appeal granted.⁷³

A valid and just judgment may lose its effect by being paid, and this payment may not have been noted of record, before a sale, regular on its face, is had, at which a stranger becomes a purchaser in good faith, and pays the amount of his bid. The rule in Pennsylvania, and probably the better opinion, is that such a purchaser obtains a good title.⁷⁴ The decisions in New York are, however, to the opposite effect; and there, if the judgment is paid or otherwise satisfied, the purchaser, even in good faith, obtains no title.⁷⁵

Closely akin to this subject is the right of a purchaser at a judicial sale which turns out void to be subrogated to the liens which have been satisfied out of the price paid by him. The title is not exactly involved; but such subrogation becomes as good as the title, when the land has gone down in value. The question has attracted most attention when sales under an administrator's or guardian's license turned out void. The course of decision seems to be such that the purchaser is subrogated, at all events, to mortgages and other special liens, but not always to the general claims of creditors, which depend on the proceedings leading to the sale; and never as to money which the fiduciary has misapplied. As to such losses he

⁷³ Iowa, St. § 3199; *Twogood v. Franklin*, 27 Iowa, 239; *Frazier v. Crafts*, 40 Iowa, 110 (treating the statute as if it was in affirmation of the common law). Quære: Would not a plaintiff who, upon a procedendo, recovers a judgment for as much as that which was reversed, be protected in his purchase anywhere, even without the aid of a statute like that of Iowa?

⁷⁴ *Samms v. Alexander*, 3 Yeates, 268; *Hoffman v. Strohecker*, 7 Watts, 86 (secus if he had notice of payment); *Nichols v. Disner*, 29 N. J. Law, 293.

⁷⁵ Though *Jackson v. Cadwell*, *supra*, inclines towards the Pennsylvania doctrine. The contrary rule is settled by *Wood v. Colvin*, 2 Hill, 566; *Jackson v. Anderson*, 4 Wend. 474; *Craft v. Merrill*, 14 N. Y. 456 (sheriff cannot sell for his commission after debt is paid); *Stilwell v. Carpenter*, 59 N. Y. 414; *Ten Eyck v. Craig*, 62 N. Y. 406 (debt satisfied by foreclosure sale). It is said: "If it was paid when the execution was issued, the process was void from the beginning, and if it was paid after it was issued, the power of sale became ipso facto extinguished." 59 N. Y. 419.

takes the risk by buying at an illegal sale.⁷⁶ Here, also, belongs the duty of a minor or lunatic, or of his heirs, to restore to the purchaser under a void sale so much of the purchase money as may have actually come to their hands.⁷⁷

§ 165. The Judgment Lien.

Since lands have been made subject to the payment of debts by the levy of execution, a new lien known as the "judgment lien," resting upon all the lands then belonging to or which may thereafter be acquired by the defendant, has been developed in American law, which in plain cases is enforced by an execution; this, with its levy and sale, dates back to the beginning of the lien. But in many cases, where the defendant's interest is only an equity, or where it is incumbered, it can only be made available by suit in equity or action in its nature. It binds the lands of the debtor which he may own either when the lien first takes effect, or which he at any time thereafter before its extinction may acquire by either purchase or descent. This lien is the creature of state statutes. In the New England states, where attachments at the beginning of an action for money are easily obtained, it has been thought needless to provide for any judgment lien, except such as the plaintiff has on lands or landed interests attached, and these relate back to the levy of the attachment. Nor is there any judgment lien in Michigan, or in Kentucky.⁷⁸

⁷⁶ Duncan v. Gainey, 108 Ind. 579, 9 N. E. 470; Perry v. Adams, 98 N. C. 167, 3 S. E. 729; Stults v. Brown, 112 Ind. 370, 14 N. E. 230 (called here a vendor's lien); Pool v. Ellis, 64 Miss. 555, 1 South. 725. Contra, Huse v. Den, 85 Cal. 390, 24 Pac. 790. This subject is treated fully in works on equity.

⁷⁷ Brandon v. Brown, 106 Ill. 519. These cases do not rest on the maxim, "He who seeks equity must do equity;" for the original owner or his heir have a complete remedy at law. This subject is treated most fully in works on estoppel.

⁷⁸ There was a law establishing the lien of judgments in Connecticut from 1878 to 1888. Now a lien may be obtained in that state by a subsequent suit. Sess. Acts 1878, c. 58 (now section 3031, Gen. St.). See Flynn v. Morgan, 55 Conn. 130, 10 Atl. 466. This is, in fact, a *lis pendens* lien. In Kentucky, a judgment may give rise to a lien, in an equitable suit to enforce it after return of no property, either against absent defendants, where a simple creditor could not proceed without attachment (Code Prac. § 417), or against fraudulent gran-

In the other states, one of two systems is in vogue: either the entry of the judgment in the proper court works out its lien upon all the debtor's lands in the county in which the court sits by its own vigor, or the judgment must first be "docketed" in some book, either in the clerk's office of that court, or more frequently in the registry of deeds of that or another county, to become a lien on the lands therein, at least as against purchasers or incumbrancers without notice. The docketed judgment thus becomes a "blanket mortgage" on all the defendant's lands in the county in which it is registered, and ranks as such from its date, subject to loss of priority in case of laches and to qualification in its conflict with unrecorded deeds. In the states which do not require docketing in the home county, the lien of the judgment may run back not only to the moment of its rendition, but to the first day of the term at which it was rendered.⁷⁹ Several of the states reserve to themselves the privilege that a judgment in their own favor against a revenue officer and his sureties on his official bond shall, as a lien, relate back to the beginning of the action; thus making of these bonds almost mortgages on the lands of principals and sureties; and the statutes to that effect have been generally sustained.⁸⁰

tees, whom a simple creditor could not attack without attachment. *Napper v. Yager*, 79 Ky. 241; *Martz v. Pfeifer*, 80 Ky. 600. In Georgia, the judgment lien is first recognized by an act of 1892.

⁷⁹ The New York Code Civ. Proc. § 1250, expressly says that a judgment not docketed does not affect real estate or chattels real. See *Sheridan v. Andrews*, 49 N. Y. 478; *Hathaway v. Howell*, 54 N. Y. 97 (under Code of Procedure). So, also, in Wisconsin, § 2905a; Minnesota (impliedly), c. 66, § 277; California, Code Civ. Proc. § 671 (docket kept in clerk's office of court rendering judgment); Pennsylvania, Brightly, Purd. Dig. "Judgment," 27; North Carolina, Code, §§ 435, 436; Dakota Territory, Code Civ. Proc. § 300; and the Codes of Procedure of Montana, Idaho, and Nevada, etc. (see at or near sections named in note 82). The Georgia act of 1892 (No. 74) is an amendment to section 3331 of the Code, which relates to the lien of attachments. It gives to a judgment in general words a lien which is good against subsequent judgments or attachments for four years. Where the lien depends on the county containing the land, it is not affected by a change in the county lines. *Garvin v. Garvin*, 34 S. C. 388, 13 S. E. 625. Where county B is attached to county A for judicial purposes, docketing in the latter is sufficient. *Folts v. Ferguson*, 77 Tex. 301, 13 S. W. 1037.

⁸⁰ Indiana, Rev. St. § 609; *Shale v. Francis*, 30 Ind. 92. Lien dates back to (1232)

By an act of congress, re-enacted in the Revised Statutes of the United States, a judgment of the circuit or district court is made a lien on lands within the district to the same extent as the judgment of a state court is under its own laws. By an act of August 1, 1888, it is provided that wherever the state law raises the lien on the defendant's land only when the judgment is docketed, the judgment rendered in the United States courts must also be docketed in like manner in each county in which there are lands of the defendant that are to be subjected, but only if the state laws authorize the docketing of federal court judgments; and the judgment or decree need not be docketed in the county in which the court is held, in order to bind the lands lying therein.⁸¹

The elements of the entry on the docket are well defined by the form which the laws of New York and the states borrowing its jurisprudence have prescribed for the book in which they are to be kept: (1) The full name of the defendant, with such additions as to residence, title, etc., as the judgment contains. (2) Name of party re-

original complaint, though it be amended. *Fleenor v. Taggart*, 116 Ind. 189, 18 N. E. 606. In Kentucky, the execution lien (there being no judgment lien) relates back, in like manner, to the beginning of such a suit (see St. 1894, § 4176). So, in Virginia, § 616, if the notice by which the suit is commenced is put on record (Virginia, Code, § 616), but only against the treasurer, not against his sureties. Not so, in West Virginia; nor in Maryland. See Gen. Pub. Laws, art. 81, §§ 69-83.

⁸¹ 25 United States Stat. p. 357 (chapter 729), which is a limitation of section 967 of the Revised Statutes of the United States, under which judgments and decrees in the circuit and district courts of the United States within any state shall cease to be liens on real estate or chattels real, in the same manner, and after like periods, as judgments and decrees of the courts now cease by law to be liens thereon (the "now" meaning 1874). There are state statutes for docketing, or otherwise recognizing, the lien of judgments in the United States courts. Wisconsin, § 2902b; Iowa, act amendatory to section 2885, Gen. St. (subjoined to it); Mississippi, Code, § 760; Washington, Code Proc. § 456; Minnesota, c. 66, § 279, and many statutes in other states passed since the act of congress of 1887. See the United States judgment lien upheld, in *Lawrence v. Belger*, 31 Ohio St. 175; docketing in foreign county not required under old law, *Doyle v. Wade*, 23 Fla. 90, 1 South. 516. The lien was, even before 1887, held to extend only to the county in which the court is held (*Vance v. Johnson*, 10 Humph. [Tenn.] 214); and since (*Alsop v. Moseley*, 104 N. C. 60, 10 S. E. 124). As to effect of dividing district pending suit, see *Dermott v. Carter*, 109 Mo. 21, 18 S. W. 1121.

covering the judgment. (3) The sum in figures. (4) The day, hour, and minute when the judgment roll (or abstract) was filed. (5) The day, hour, and minute when it was docketed. (6) The court wherein the judgment was rendered. (7) Name of the attorney for the party recovering. And, if there are several defendants, the entry must be made as to each. Such is substantially the law in Wisconsin, Minnesota, Pennsylvania, New Jersey, California, Colorado (filing abstract with county clerk), Idaho, Montana, Nevada, North and South Dakota, West Virginia, Alabama (since February 28, 1887), Texas, North Carolina, Utah, Arizona, and New Mexico.⁸² The docket entry must be based on a judgment final in its nature, and the indexing of the docket, where the law requires it (as in Pennsylvania) on a valid docket. The indexing cannot cure a defect in the docket, nor the docket in the judgment.⁸³

⁸² New York, Code Civ. Proc. § 1246; corresponding sections in Wisconsin, § 2902; Minnesota, c. 66, § 277; other states near the sections quoted in note 79; Mississippi, Code, § 756 (form differing but slightly from that of New York); California, Code Civ. Proc. §§ 671, 672; Washington, §§ 449, 455, as to justice's judgments, etc. There is always a section closely following that which gives the rules for docketing (e. g. California, Code Civ. Proc. § 674) as to docketing in "foreign county." In Pennsylvania the law for docketing judgments was enacted, in the main, in 1827. See Brightly, Purd. Dig. "Judgment," §§ 22, 33. The law includes awards of arbitrators that are made judgments by rule of court, and the reports of balance due by treasurer to county (Act of 1834). See Snyder County's Appeal, 3 Grant, Cas. 38. Great accuracy as to name is required in this state. Ridgway's Appeal, 15 Pa. St. 182; Bank's Appeal, 36 Pa. St. 458; Smith's Appeal, 47 Pa. St. 128; Wood v. Reynolds, 7 Watts & S. 406. Contra, Jones' Estate, 27 Pa. St. 336; Myer v. Fegaly, 39 Pa. St. 429 (*idem sonans*). Actual notice has been held equal to docketing, if personal. Bank's Appeal and Smith's Appeal, *supra*; Dakota Territory, Code Civ. Proc. § 300; Montana, Code Civ. Proc. § 307; Idaho, Rev. St. § 4400; Nevada, §§ 3228, 3229; Oregon, § 269; Texas, Rev. St. art. 3155. As to nicety in name of plaintiffs, see Anthony v. Taylor, 68 Tex. 403, 4 S. W. 531. Quære, can recording the abstract restore the lien of a dormant judgment? *Id.* An abstract not giving the number of the judgment ineffectual. Bonner v. Grigsby, 84 Tex. 330, 19 S. W. 511. In Pennsylvania, the lien law was amended by an act of June 1, 1887, so that the judgment cannot be a lien for more than five years, though revived or kept alive by the issue of executions. If revived, it becomes a lien again for five years from the award on the scire facias. In West Virginia (c. 139, §§ 4-6), the judgment is a lien from the first day of the term, without docketing, against all but bona fide purchasers.

⁸³ See, as to necessity of indexing the docket, Virginia, Code, § 3575. Com- (1234)

In Iowa a judgment for money in the supreme, district, or circuit court is a lien from the time of its rendition, on the lands of defendant in the county in which the court is held, and on all the lands which he may acquire thereafter (within 10 years) by its own force, but on lands in another county only from the time that an attested copy of the judgment is filed with the clerk of the district court in that county; and the same principle prevails in Missouri and in Indiana. The clerk of the court is directed to make a docket and index even in the home county, but his doing so is not made a prerequisite of the lien.⁸⁴

In Mississippi, though the judgment must be enrolled within 20 days and docketed within 5 days thereafter, yet, when this is done, the lien relates back to the very moment when the judgment was rendered, as marked by or under the direction of the judge on the minutes or papers; which, in the absence of proof, is supposed to be the earliest moment of the day on which the judgment could have been rendered.⁸⁵

pare Minnesota, St. c. 66, § 277 ("the judgment from the time of docketing the same becomes a lien"), and chapter 8, § 261 (among the books to be kept by the district court clerk, "a docket in which he shall enter alphabetically the name of each party to the judgment," etc., where docket and index are one). Where the docket entry and index are separate, the former, if right, prevails over a mistaken index. *Mather v. Jenswold*, 72 Iowa, 550, 34 N. W. 327; *Gullett Gin Co. v. Oliver*, 78 Tex. 189, 14 S. W. 451 (index in firm name is not proper, but held not material). Good index will not cure a defective docket. See Pennsylvania, *Dig. "Judgment,"* 27, and notes. Too great nicety about the docket and index was rebuked, in *Hesse v. Mann*, 40 Wis. 560. But, as the judgment lien is wholly statutory, it stands on a different ground from a conveyance or mortgage which works by the act and intent of the owner, and the defeat whereof, for want of registry, is demanded by statute; that is, the judgment creditor must see to it, at his own risk, that all steps as to docket and index to perfect the lien are taken. *Ferris v. Smith*, 24 Vt. 27 (same principle as to attachment); *Metz v. National Bank*, 7 Neb. 165 (docket of judgment rendered against one Hall, a member of T. Hill & Co., under name of "Hill & Co." on defendants' index, held ineffectual). Effect of docket in West Virginia complete, though clerk fails to index it. *Calwell v. Prindle*, 19 W. Va. 604.

⁸⁴ Iowa, St. §§ 2882-2885. As to transcripts from justices, see *Id.* §§ 3567, 3568; Missouri, Rev. St. §§ 6011, 6049; Indiana, Rev. St. §§ 608, 610.

⁸⁵ Mississippi, Code, §§ 756, 757; *Clark v. Duke*, 59 Miss. 575 (not when the minutes are signed, which might be much later).

In Ohio, Virginia, Kansas, and Wyoming the lien of the judgment holds good from the first day of the term at which it was rendered, except that judgments by confession, or such other judgments as were rendered upon actions begun within the term (and in Virginia all judgments that in the course of procedure could not have been rendered on the first day of the term), take effect as a lien from the time of rendition on all the lands within the county in which the court is held. In Ohio, where the judgment is rendered in the supreme court on error, it relates back to the first day of the term in which the court below has rendered its judgment. To bind land in other counties, an abstract of the judgment must be filed therein. In Virginia, in order to have precedence of purchasers for value, the judgment must be docketed within 20 days, or at least 15 days before the competing deed.⁸⁶

In Tennessee, the judgment is a lien on all the lands in the county from its rendition. Lands in another county are bound only by registration in the county in which the defendant resides, or, if he is a nonresident, by registration in the county in which the land lies. Equitable interests are not bound, unless the judgment is registered on the proper docket within 60 days from its rendition.⁸⁷

In Illinois also the lien arises as soon as the judgment is rendered, or, when it has become dormant, as soon as it is revived by scire facias, as to land in the home county. Formerly, a lien in other counties could be obtained only by execution; now by transcript filed with the clerk of the court in that county; and all judgments rendered

⁸⁶ Ohio, §§ 5375, 5376 (also, section 6057, which carries the lien of a judgment by the state against revenue officers and their sureties back to the commencement of suit on the bond, and section 5236); Virginia, § 3567, etc., dating back to the Code of 1849; Kansas, St. § 4515; Wyoming, St. § 2722. In *Gatewood v. Goode*, 23 Grat. 880, for reasons not explained, a judgment was held a lien in a "foreign" county, and it was held that this lien was not lost by the division of the state throwing the court rendering the judgment into West Virginia. Long delay in return of fi. fa., though made proof of payment as against sheriff, does not destroy the judgment lien. *Paxton v. Rich*, 85 Va. 378, 7 S. E. 531. The lien of judgment in the Cincinnati superior court covers all Hamilton county. *Linsley v. Logan*, 33 Ohio St. 376.

⁸⁷ Tennessee, Code, § 3694; *Berry v. Clements*, 9 Humph. 312, 318. It was held in *Cox v. Hodge*, 1 Swan, 371, that, in the absence of proof to the contrary, the judgment is referred to the first instant of the day.

at the same term, or entered on the same day in vacation are of the same dignity. The short time during which, under the former law prevailing in Illinois, the judgment operated as a lien on land, gave rise to a great deal of litigation; and to remedy the evil an act was passed on the 3d of June, 1889, extending the lien to a period of seven years, but otherwise the former conditions of equality among judgments of the same term or day still exist.⁸⁸

In Arkansas and Florida the judgment of the circuit court binds the lands of the defendant in the county where it is rendered from the time when it is rendered. That of the supreme court must, at least in the former state, be first entered in the lower court by transcript. As to lands in "foreign" counties, the former state makes no provision at all; thus leaving them to be reached by execution only; while in the latter state a transcript of the judgment binds such lands when "recorded" in that county; i. e. when it is transcribed in the registry of deeds.⁸⁹

In Maryland and in the District of Columbia the judgment of a court of record is a lien on lands and leasehold from its rendition. There is no provision in the former (and none is needed in the latter) as to foreign counties. The present Maryland statute gives this lien by a sort of implication.⁹⁰ Where the life of the lien is reckoned from the issual of the last execution, the writ is not deemed to be issued until it is delivered to the sheriff, or at least put into a box under his control.⁹¹

Any final order that can justly be enforced by a general execu-

⁸⁸ Illinois, c. 77, §§ 1, 2, 7, et seq. The law has been redrafted in 1872, and with a slight change in 1889. Formerly the lien began on the last day of the term at which judgment was rendered. No lien, when judgment is dormant, —i. e. when no execution has been issued for a year. St. Joseph Manuf'g Co. v. Daggett, 84 Ill. 556. And the revivor of judgment does not cut out purchases made in the meantime. Cottingham v. Springer, 88 Ill. 90; Missouri, Rev. St. §§ 6010–6012. In Missouri land may be sold on a junior execution, subject to lien of older judgments. Bruce v. Vogel, 38 Mo. 101.

⁸⁹ Arkansas, Dig. St. §§ 3916–3926; Florida, §§ 1173, 1174.

⁹⁰ Maryland, Pub. Gen. Laws, art. 26, § 19; Bish v. Williar, 59 Md. 382; Ahern v. White, 39 Md. 409. Section 1022, 2 Rev. St. U. S., as to justices' judgments, presupposes the old Maryland act of 1798 as to judgments of superior courts to be in force.

⁹¹ Pease v. Ritchie, 132 Ill. 638, 24 N. E. 433.

tion against all of a person's property carries with it a lien on his land, as a decree adjudging a debt personally and ordering land to be sold at the same time for its satisfaction; and a decree ordering the defendant to pay a sum for a tract of land bought by him, is a lien on his other lands. An order for the parties to withdraw certain sums out of a fund in the hands of a commissioner is a lien on the commissioner's lands.⁹² But a decree ordering the defendant to pay an annuity can only be regarded as interlocutory. Until any one installment falls in, and judgment on suggestion is given for the payment of that installment, there is no lien.⁹³ The law generally provides that a judgment of affirmance in a higher court shall stand protected by the lien which attends the judgment below; but it seems admitted that the damages in the upper court are not covered; and it would seem that the costs in that court are not.⁹⁴ Wherever docketing is required, a judgment becomes a lien only as against that one of several defendants, whose name is placed in the docket, and as to whom it is or can be indexed.⁹⁵ The judgment lien reaches not only the fee in lands, held by the defendant, but an estate for life, a leasehold or chattel real (in some states only, if five years are still unexpired), a reversion or vested remainder, in fact any estate in land that is liable to execution, or to any process for the satisfaction of debts, including equities, whether appearing of record or not; though there are seemingly arbitrary ex-

⁹² Killbreth v. Diss, 24 Ohio St. 379; Linsley v. Logan, 33 Ohio St. 376; Lisle v. Cheney, 36 Kan. 578, 13 Pac. 816 (where the counsel against the lien could find no precedent for denying it); West Virginia, Code, c. 139, § 1 (gives it expressly); Lee v. Swepson, 76 Va. 173 (money in commissioner's hands); Appeal by Hohman, 127 Pa. St. 209, 17 Atl. 902 (similar case); Knox v. Merrill, 22 Kan. 572 (amercement against officer); West Virginia Code expressly gives the lien on bonds and recognizances having the force of judgments. Chapter 139, § 3. Cabell v. Given, 30 W. Va. 760, 5 S. E. 442. Damages and costs in ejectment against husband and wife a lien on wife's land. Morris v. Wheeler, 45 N. Y. 708. In Illinois, see sections 44, 45, of the chapter on "Chancery," and Kirby v. Runals, 140 Ill. 289, 29 N. E. 697 (decree upon mortgage not a lien on other lands, unless the money is adjudged personally), distinguishing Eames v. Germania Turn Verein, 74 Ill. 54. See, also, Serles v. Cromer, 88 Va. 426, 13 S. E. 859.

⁹³ Miller v. Peters, 25 Ohio St. 273.

⁹⁴ Montgomery v. McGimpsey, 7 Smedes & M. (Miss.) 557.

⁹⁵ Hughes v. Lacock, 63 Miss. 112.

ception in some states.⁹⁶ But a mortgage, which is in equity deemed only an incident to the debt, and, a fortiori, a vendor's lien, is not so far "land" as to be subject to this lien.⁹⁷ And the naked title of a trustee, or a momentary seisin, such as that of conduit between husband and wife, or that which elapses between receipt of deed and giving mortgage for purchase money, is not reached by the judgment lien, though lands subsequently acquired are in nearly all cases covered by the express words of the statute.⁹⁸ In fact the

⁹⁶ Cook v. Dillon, 9 Iowa, 407; Lippencott v. Wilson, 40 Iowa, 425; Denegre v. Haun, 13 Iowa, 240 (an unrecorded equity); Lathrop v. Brown, 23 Iowa, 40; Van Camp v. Peerenboom, 14 Wis. 65 (speaks of all equities); Eastman v. Schettler, 13 Wis. 325 (land conveyed in fraud of creditors); Trustees of Real-Estate Bank v. Watson, 13 Ark. 74 (reversion); Jones v. Fletcher, 42 Ark. 422 (partner's interest in firm lands); Ballinger v. Drook, 101 Ind. 172, and Lawrence v. Belger, 31 Ohio St. 175 (vested remainder), and prevails against remote purchasers; Mitchell v. Wood, 47 Miss. 237. Lien binds leasesholds. First Nat. Bank v. Bennett, 40 Iowa, 537. See, also, Crane v. O'Connor, 4 Edw. Ch. 409; Mason v. Lord, 40 N. Y. 477; Evans v. Feeny, 81 Ind. 539; Gentry v. Allison, 20 Ind. 481; Maryland, Pub. Gen. Laws, art. 26, § 19. In New York (Code Civ. Proc. § 1253) a right to land under contract for purchase is not bound; nor in Indiana, when it seems rights to redeem (Cincinnati, H. & D. R. Co. v. Heim, 97 Ind. 525) and equities generally are not reached by this lien (Modisett v. Johnson, 2 Blackf. 431; Terrell v. Prestel, 68 Ind. 86; Conner v. Wells, 91 Ind. 197), except the equity of redemption of the mortgagor (Julian v. Bell, 26 Ind. 220). In Illinois executory rights of purchaser are bound. Gorham v. Farson, 119 Ill. 425, 10 N. E. 1. So in Iowa. Rand v. Garner, 75 Iowa, 311, 39 N. W. 515. Even a parol purchase with possession. Logan v. Hale, 42 Cal. 645. In New Jersey a judgment at law is not by itself a lien on equities. Trusdell v. Lehman, 47 N. J. Eq. 218, 20 Atl. 391; Sipley v. Wass, 49 N. J. Eq. 463, 24 Atl. 233. Lease with less than five years to run not bound in New York. Taylor v. Wynne, 57 Hun, 590, 10 N. Y. Supp. 644. In Pennsylvania "rent charges" are subjected to the lien by the words of the statute. The right of redemption from a tax sale is subject to this lien. McNeill v. Carter, 57 Ark. 579, 22 S. W. 94.

⁹⁷ Scott v. Mewhirter, 49 Iowa, 487; Woodward v. Dean, 46 Iowa, 499. Secus, where the vendor still holds the title. Hibberd v. Smith, 50 Cal. 511; Courtney v. Parker, 21 Neb. 582, 33 N. W. 262.

⁹⁸ Moyer v. Hinman, 13 N. Y. 180; O'Donnell v. Kerr, 50 How. Prac. 334; Lounsbury v. Purdy, 18 N. Y. 515; Heberd v. Wines, 105 Ind. 242, 4 N. E. 457; Ransom v. Sargent, 22 Kan. 516 (deed made to defendant, to get up a "real-estate note"); Hays v. Reger, 102 Ind. 524, 1 N. E. 386; Brehner v. Johnson, 84 Iowa, 23, 50 N. W. 35; Johnston v. Lemond, 109 N.

judgment creditor (or rather, the execution purchaser on his behalf) takes subject to all equities and liens that rest on the defendant's land; ⁹⁹ it being observed that the lien is "general," and therefore has no resemblance to an ordinary mortgage on lands therein described, though here again we have, when discussing the force of unrecorded conveyances, found divergences in some of the states. On the other hand the lien will not give to the creditor the benefit of a secret equity of the defendant against the purchaser in good faith of the legal title.¹⁰⁰ Where a purchaser has taken possession of the land, having paid the full price, but not taken his deed, or where a mortgagee has taken his security with a mistaken description, the judgment lien has been postponed to such purchase or mortgage.¹⁰¹ The lien of the judgment is, generally speaking, not defeated by the death of either plaintiff or defendant, though other remedies may, by such an event, become necessary for its enforcement, or its duration may be shortened.¹⁰² But when the right of the plaintiff

C. 643, 14 S. E. 86 (momentary seisin free of mortgage); *Wade v. Sewell*, 56 Fed. 129; *Main v. Bosworth*, 77 Wis. 660, 46 N. W. 1043.

⁹⁹ *Walton v. Hargroves*, 42 Miss. 18; *Foute v. Fairman*, 48 Miss. 536 (unexpressed vendor's lien); *Warren v. Hull*, 123 Ind. 126, 24 N. E. 96; *Churchill v. Morse*, 23 Iowa, 229; *Foltz v. Wert*, 103 Ind. 409, 2 N. E. 950; *Floyd v. Harding*, 28 Grat. 401 (possession under contract of sale); *Cowardin v. Anderson*, 78 Va. 88; *Sinclair v. Sinclair*, 79 Va. 40; *Snyder v. Botkin*, 37 W. Va. 355, 16 S. E. 591. Subject to equitable mortgage put in suit before docketing of lien. *Lebanon Sav. Bank v. Hollenbeck*, 29 Minn. 322, 13 N. W. 145. However, in *Bayley v. Greenleaf*, 7 Wheat. 46, coming up from the district, the supreme court, in deference to the recording laws of Maryland, preferred the judgment to a secret vendor's lien. The lien is postponed to a purchase-money mortgage on land bought thereafter, *Rasin v. Swann*, 79 Ga. 703, 4 S. E. 882; there being only a momentary seisin. Equitable principles govern the lien. *Howe Mach. Co. v. Miner*, 28 Kan. 441; *Berryhill v. Potter*, 42 Minn. 279, 44 N. W. 251. The lien does not attach to the husband's share in the estate by entirieties. *Bruce v. Nicholson*, 109 N. C. 202, 13 S. E. 790.

¹⁰⁰ A judgment lien on a secret equity does not hold against a bona fide purchaser of the fee. *Gordon v. Rixey*, 76 Va. 694; *Wells v. Benton*, 108 Ind. 590, 8 N. E. 444, and 9 N. E. 601. Whatever is here said applies to the lien of the execution as well.

¹⁰¹ *Goodell v. Blumer*, 41 Wis. 436; *Carver v. Lassallette*, 57 Wis. 232, 15 N. W. 162; *Withers v. Carter*, 4 Grat. 507; *Floyd v. Harding*, 28 Grat. 401; *Swarts v. Stees*, 2 Kan. 236.

¹⁰² *Shannon v. Newton*, 132 Pa. St. 375, 19 Atl. 138 (though duration shortened—(1240)

to have execution ceases, the lien cannot be enforced in equity, where the statute provides the remedy by attachment expressly after the time for execution has expired.¹⁰³

The duration of the lien is of different length in the several states and territories, and the numbers of years here given must be held subject to corrections on the following scores: Deducting time while the judgment is restrained by supersedeas or by injunction; counting from the rendition of the judgment, or from the last day of the term; lastly, the time may be shortened by failure to take out execution, or it may be lengthened by revival on scire facias. Not undertaking to state these matters very fully, we give the duration of the lien, and some of the decisions bearing upon it, in a note.¹⁰⁴

ed). Judgment paid by replevin bail, he is subrogated to lien. *Downey v. Washburn*, 79 Ind. 242. Like a mortgage, the judgment lien is superior to the rights of a wife thereafter marrying the debtor. *Eiceman v. Finch*, Id. 511.

¹⁰³ *Flagg v. Flagg*, 39 Neb. 229, 58 N. W. 109, and cases there cited; Ruth's Appeal, 54 Pa. St. 173; *Titman v. Rhyne*, 89 N. C. 64; *Tracy v. Tracy*, 5 McLean, 456, Fed. Cas. No. 14,128; *Newell v. Dart*, 28 Minn. 248, 9 N. W. 732.

¹⁰⁴ New York, 10 years; may be revived for ten years more. New Jersey, the same. Pennsylvania, under the act of June 1, 1887, 5 years, and may be revived and continued for 5 years from time to time. As to length of lien after conveyance by debtor, see *Wetmore v. Wetmore*, 155 Pa. St. 507, 26 Atl. 694. Scire facias must be served on terre-tenants to keep lien alive. *Porter v. Hitchcock*, 98 Pa. St. 625 (formerly 20 years). Delaware, 20 years. Maryland and District of Columbia, 12 years, which it seems may be extended by scire facias to which the terre-tenants are made parties. *Bish v. Williar*, 59 Md. 382; *Lambson v. Moffett*, 61 Md. 426. Virginia, 10 years. *Paxton v. Rich*, 85 Va. 378, 7 S. E. 531. No longer in equity than at law. *Dabney v. Shelton*, 82 Va. 349. West Virginia, 10 years, or 5 years after representative of dead defendant qualifies. North Carolina, 10 years. Time of restraint by appeal not counted, including appeal from fiat on scire facias. *Adams v. Guy*, 106 N. C. 275, 11 S. E. 535. On justice's judgment, 7 years. Id. South Carolina, 10 years, and may be kept alive by suing out executions from 5 to 5 years (the act of 1879, allowing 20 years after execution, applies only to judgments rendered before 1870). *Henry v. Henry*, 31 S. C. 1, 9 S. E. 726. Revival after lien once expired only prospective. *Woodward v. Woodward*, 39 S. C. 250, 17 S. E. 638. Ohio, if execution is within a year, as long as they are issued from 5 to 5 years. Indiana, 10 years. See *Kinney v. Dodge*, 101 Ind. 573; *Shanklin v. Sims*, 110 Ind. 143, 11 N. E. 32. Time of restraint by injunction or supersedeas not counted. On justice's judgment, 10 years from rendition. *Brown v. Wuskoff*, 119 Ind. 569, 19 N. E. 463, and 21 N. E. 243. Lien in foreign county runs from rendition. *Bradfield v. Newby*, 130 Ind. 59, 28 N.

The loss of priority of lien between judgment and judgment is not a question of title, and therefore not within our province. The period of the lien, not having expired when an execution is issued and levied, may run out before the day of sale. Without any apparent difference in the wording of the statutes, the result has been decided in three different ways. It was held in Illinois under the former law (before 1872), that after the expiration of the seven years of the judgment lien, the sheriff could not go on, as the judgment

E. 619. Illinois, 7 years; but, if execution is taken within this time, the lien is extended to a sale within 1 year. See cases in note 88. Time of restraint, as above, not counted. Wisconsin, 10 years, and cannot be revived. Denegre v. Haun, 13 Iowa, 249; Virden v. Shepard, 72 Iowa, 546, 34 N. W. 325; Polk Co. v. Nelson (Iowa) 43 N. W. 80. Justice's judgment counts from rendition. Stover v. Elliott, 80 Iowa, 329, 45 N. W. 901. Missouri, judgment must be revived from 3 to 3 years, but not to exceed 10 years. Time of restraint does count. Christy v. Flanagan, 87 Mo. 670. Nebraska, five years from first day of term (or rendition of judgment, as case may be), and, it seems, 5 years more, if revived. Kansas, 5 years from first day of term (or, etc.), and may be revived for 5 years more (St. § 4515). North and South Dakota, 10 years. Texas, while execution issues from year to year, for not over 10 years. Barron v. Thompson, 54 Tex. 235; Bassett v. Proetzel, 53 Tex. 579; Ficklin v. McCarty, 54 Tex. 371; Williams v. Davis, 56 Tex. 250. See, as to diligence needed to keep up lien of judgments before Rev. St. of 1879, under article 3783 of Paschal's Digest, Adams v. Crosby, 84 Tex. 99, 19 S. W. 355. Colorado, 6 years. California, 2 years from day of docketing, unless delayed by appeal. Eby v. Foster, 61 Cal. 282. Idaho and Nevada, same as California. Washington, 5 years. Oregon, as long as the judgment is kept alive by suing out execution within 10 years. Wyoming, 5 years. Quære, if longer when the judgment is kept alive by executions? Alabama, under the act of 1887, 10 years. Quære, as to revival. Under Code Miss. § 2750, the lien is good for seven years, unless action is brought to revive it; but it can be kept alive by fil. fa. issued within each seven years. Buckner v. Pipes, 56 Miss. 366; Stith v. Parham, 57 Miss. 289. Arkansas, 3 years. If the judgment, before it becomes dormant, is revived, there is a new lien from date of scire facias. If scire facias is taken afterwards, the new lien is only from award of execution. Hanly v. Adams, 15 Ark. 232. Arizona, 5 years. Utah, 2 years, as in California. In Tennessee the lien is good upon the legal estate for 12 months, and on equities, after being perfected by docketing in the recorder's office, for 30 days only, in which time a bill in equity must be filed. Time of restraint by appeal or injunction is not counted. But see Shepherd v. Woodfolk, 10 Lea, 598. Stay by agreement does not extend the lien. Love v. Harper, 4 Humph. 116. A judgment on the judgment does not keep the old lien alive. Ford v. Delta & Pine Land Co., 43 Fed. 181.

was wholly spent; but this has been remedied by the present statute. But in Tennessee, where the lien is good for only 12 months, the execution may go on thereafter; only it will not relate back, and overreach intermediate conveyances, but bind the defendant's land only through its own force. And so it is in New York, in Iowa, in Indiana, in California, and in the states copying the California statute.¹⁰⁵ In Missouri, and perhaps in some other states, an execution, if levied within the lifetime of the lien, keeps it in force to the sale, and the purchaser's title relates back to the beginning; and where the judgment lien can be enforced by suit in equity, begun before the end of the lien period, such suit may, of course, after the end of that period, go on to its termination.¹⁰⁶ A stay of execution, whether by operation of law (e. g. where the defendant gives a stay bond or "replevin bail") or by the free consent of the plaintiff, does not release the lien, unless in so far as a voluntary stay given to the principal debtor might release the surety and thus release the lien on his land.¹⁰⁷ It is the better opinion, at least in all those states in which the inheritance is cast directly on the heirs and not on the administrator, to be distributed by him (as in Georgia), that a judgment at law against the personal representative does not create a lien on the descended or devised lands.¹⁰⁸ Where the lien

¹⁰⁵ For Tennessee, see *Kelly v. Thompson*, 2 Heisk. 278; contra, when sale is had within 12 months, *Miller v. Estill*, 8 Yerg. 452 (Code, §§ 3696, 3697) unless restrained as above. For California, see *Eby v. Foster*, *supra*; *Barroilhet v. Hathaway*, 31 Cal. 397. Also, *Wells v. Bower*, 126 Ind. 115, 25 N. E. 603. For New York, *Graff v. Kip*, 1 Edw. Ch. 619; *Mower v. Kip*, 6 Paige, 88; *Darling v. Littlejohn*, 58 Hun, 608, 12 N. Y. Supp. 205. In Iowa, *Albee v. Curtis*, 77 Iowa, 644, 42 N. W. 508; *Lakin v. McCormick*, 81 Iowa, 545, 46 N. W. 1061.

¹⁰⁶ "Till writ is executed." *Riggs v. Goodrich*, 74 Mo. 108. As to suit to set aside fraudulent conveyances, even in Illinois, *Davidson v. Burke*, 143 Ill. 139, 32 N. E. 514. In Texas, *Cole v. Terrell*, 71 Tex. 549, 9 S. W. 668.

¹⁰⁷ *Lisle v. Cheney*, 36 Kan. 578, 13 Pac. 816; *Pickett v. Planters' Bank*, 5 Smedes & M. 470.

¹⁰⁸ *Platt v. Platt*, 105 N. Y. 488, 12 N. E. 22; *Cook v. Ryan*, 29 Hun, 249. (The lien of the decedent's debts on the descended or devised lands is governed by law other than that of the judgment lien.) For revivor of lien by scire facias de terris against the heirs in Pennsylvania, see *Appeal of Williamson* (Pa. Sup.) 17 Atl. 8. *Custer v. Custer*, 17 W. Va. 113; *Angus v. Edwards* (Tex. Sup.) 5 S. W. 67.

counts from the time of the rendering of the judgment, it will, in the absence of testimony (which is, however, admissible) be presumed to be given at the first moment when, by the course of the court's procedure, it could have been pronounced; but the clerk has no power to certify to the hour of rendition.¹⁰⁹ The lien of a judgment is released by anything which destroys the judgment, such as satisfaction or reversal. The statutes mostly provide a convenient way for entering on the docket and marking on the index the satisfaction, or the reversal (or vacation otherwise) of the judgment; and, if such entry is made by the proper officer, or is signed by the attorney for plaintiff, who is named as such in the docket entry, a purchaser in good faith must be protected, even if, after the reversal or vacation, the judgment should thereafter be reinstated, in which case the lien revives.¹¹⁰

As the lien of a judgment arises only by operation of law, without the consent—generally against the will—of the owner, there is no reason why it should be extended by equity beyond the conditions on which positive law allows it. However, in one case at least, it has been held that where the entry of the judgment lien on the books of the register was defective the lien was nevertheless binding upon a purchaser who knew that the judgment had been rendered, and that an attempt had been made to raise a lien for it on the debtor's land.¹¹¹

§ 166. When Valid Execution can Issue.

The sale of land under execution has grown up into a branch of American law, without any aid from English precedents, under statutes generally of later date than the outbreak of the Revolution.¹¹²

¹⁰⁹ Clark v. Duke, 59 Miss. 578; Hunt v. Swayze, 55 N. J. Law, 33, 25 Atl. 850.

¹¹⁰ Moore v. Rittenhouse, 15 Ohio St. 310; King v. Harris, 34 N. Y. 330. So, in Ohio, where new trial is granted as of course on payment of costs, lien stands good for new judgment, Loomis v. Second German Bldg. Ass'n, 37 Ohio St. 392; but not for additional costs.

¹¹¹ Hardin v. Melton, 28 S. C. 38.

¹¹² See 4 Kent, Comm. 430. He refers to the sequestration of the profits of land by levavi facias, and possession of half the debtor's land by elegit, or the whole in certain cases by extent; and to a British statute of 5 Geo. II.

The writ under which land is usually sold is known in most of the states as a fieri facias, and has been developed from the writ known by that name at common law, either by adding the words "lands and tenements" to the words "goods and chattels" in the old writ, or by substituting for the latter the general word "estate,"—that is, by directing the sheriff to "make" the sums adjudged from "the estate" of the defendant; but in Virginia and West Virginia the judgment lien is enforced only by suit in equity, executions against the land being allowed only upon a judgment in favor of the state against a collecting officer and his sureties.¹¹³

These writs are issued, not only on judgments at law, but, even in states in which equity jurisdiction is kept separate, on decrees in chancery, for the payment of money;¹¹⁴ and, moreover, upon a number of statutory bonds and recognizances taken, under the laws of several Western and Southern states, in the course of judicial proceedings, such as stay bonds, sale bonds under judicial sales, etc., which by the local law are given "the force and effect of a judgment."¹¹⁵

c. 7, making land in the colonies liable to execution. This law was, after the Revolution at least, not deemed to be in force in Virginia and Kentucky, where lands were first sold under a statute of 1792. Chancellor Kent shows that in Massachusetts a law for the sale of lands under execution was passed as early as 1696, and in Pennsylvania in 1700 or 1705. See for retention of the elegit, Laws Del. c. 111, § 9.

¹¹³ See, for instance, New York, Code Civ. Proc. § 1369; Michigan, St. § 7692. Contra, Virginia, Code, § 687; West Virginia, Code, c. 35, § 5. In Pennsylvania and some other states the levari facias has been adapted from a levy on the produce or income of the land into a levy and sale of the land itself.

¹¹⁴ E. g. Illinois, c. 22, § 47; Alabama, Civ. Code, § 3603.

¹¹⁵ These bonds are somewhat like the old statutes merchant and statutes staple. They were introduced for the benefit of the debtor to give him time, and to prevent sacrifice by immediate sales for cash. The effect of a judgment as against principal and surety had to be given to these bonds, for to bring new suits on them would make litigation endless. Kentucky seems to have given them the widest scope. The most important among them in this state are: (1) The "replevy bond,"—i. e. the bond for staying the collection of a money judgment for three months,—which bond is given either before the clerk, while no execution is out, or to the sheriff, to stop the enforcement of an execution in his hands. (2) Sale bonds, due in three months, given at execution sales, under a first execution,—i. e. not under one issued

Courts of inferior jurisdiction, such as justices of the peace, cannot issue executions under which land may be levied on and sold; but the statute almost everywhere provides for a transcript from their docket, which may be filed in the clerk's office of a superior court, and this filing and the record entry incident thereto are made the basis for issuing an execution of like force with executions from such office upon judgments of the court to which it belongs.¹¹⁶

upon a judicial bond (chapter on "Executions"). (3) Sale bonds given at judicial sales, having such length of time to run as the credits allowed by the judgment. See Code Prac. § 697. If such bonds are not attested, are for too much or too little, or are otherwise not in form, they may be quashed; but until so quashed are valid judgments. *Hopkins v. Chambers*, 7 T. B. Mon. 261; *Prather v. Harlan*, 6 Bush, 186. But if a bond were taken and returned where none can be taken at all (e. g. a sale bond, or a forthcoming bond, under an execution on a replevy bond, such a writ being indorsed, "No security of any kind to be taken"), such a bond would not have the force of a judgment, and execution could not issue upon it. *Ditto v. Geoghegan*, 1 Metc. (Ky.) 169. Replevy bond taken by the sheriff who has property under levy, though the return day be passed, has the force of a judgment. *Savings Inst. of Harrodsburg v. Chinn*, 7 Bush, 539. Bonds taken under a void judgment are deemed to be obtained by unlawful duress, and are wholly void. *Florence v. Goodin*, 5 B. Mon. 112. In Indiana (Rev. St. §§ 691, 697) the "bail for stay of execution," varying according to the amount, under section 690, from 30 days to 180 days in length of the stay, is signed by the surety alone, always before the clerk, to an entry following the judgment. It is on his behalf a confessed judgment. The entry does not lose its force if written in another part of the record book. *Williams v. Beisel*, 3 Ind. 118. The time of stay counts from the date of the judgment, hence "bail" entered after expiration of the period allowed is unauthorized, and does not support an execution. *Osborn v. May*, 5 Ind. 217; *Eltzroth v. Voris*, 74 Ind. 461. It is known popularly as "replevin bail." Its effect is not lessened, because not attested or approved expressly by the clerk. *Miller v. McAllister*, 59 Ind. 491; *Ensley v. McCorkle*, 74 Ind. 248. In Michigan (St. § 6958) only judgments of justices can be stayed by bond; hence land can but rarely be affected by execution on such bond. So in Wisconsin. See St. § 3674. In Ohio, § 6650. In Nebraska stay is granted on all judgments for three, six, or nine months, according to amount. Consol. St. § 5005. In Iowa stay bonds are provided for by Code 1880, §§ 3061-3064, ranging for debts thereafter contracted from three to six months, while the stay of the older Revised Statutes is retained for older debts. The clause giving the bond the effect of a judgment against the surety is sustained in *Cavender v. Smith's Heirs*, 5 Iowa, 157.

¹¹⁶ New York, Code Civ. Proc. § 3043 (transcript filed with county clerk); (1246)

Suppose a contest to arise between the creditor holding the execution lien, or the purchaser who has bought the defendant's land (or to whom it has been extended under the New England system), and the holder of a subsequent conveyance or incumbrance from the defendant, the former owner. It involves the point of time at which the execution attaches, or to which it relates back, which we will first discuss. It further involves the recording laws, in so far as they postpone unrecorded deeds to the claims of creditors, which has been discussed in another chapter. It also opens up the question of fraudulent conveyances, which must also be discussed by itself if it came at all within the purview of this work. The land, also, may not be subject to levy, being the debtor's homestead, or otherwise exempt. This matter must also be discussed in another place.

The third question we here discuss is: Have all the steps, from the issual of the execution, including its form and contents, passing to its delivery to the officer, its levy on the particular land, the notice of time and place of sale, the conduct of the sale, the payment of the purchase price, and the report made by the sheriff or other officer in his "return," been such as to constitute the highest bidder at the sale a lawful purchaser?

Fourth and last, is the sale subject to redemption? On what terms may the land be redeemed? Has the time for redemption expired? The second, third and fourth of these points will be treated in other sections.

Coming back to the time for which the judgment remains alive, so that the clerk or prothonotary may issue an execution thereon without judicial award, it is, at common law, "a year and a day," and when an execution has once been issued, "the court will grant a writ of scire facias in pursuance of Stat. Westm. II."¹¹⁷ The question may

Michigan, St. §§ 6993, 6994 (transcript and affidavit by plaintiff of amount due). Execution by clerk void, if transcript not signed by justice or affidavit not filed. Bigelow v. Booth, 39 Mich. 622. Kentucky, Code Prac. § 723. As to executions from marine court (N. Y.) see Dunham v. Reilly, 47 Hun, 241.

¹¹⁷ See 3 Bl. Comm. 421, referring to St. 13 Edw. I. c. 45. For practice after first execution issued and not satisfied, see Tidd, Prac. p. 1104, and next note. The final order on a scire facias is not quod recuperet, as it would be in an action of debt on the judgment. Hence, the time of limitation or presumption of payment still runs from the original judgment, not from the order on the scire facias. Meek v. Meek, 45 Iowa, 294.

thus become important: What is the issual of an execution? And it seems clear that delivery to the sheriff or like officer enters into the issuing (i. e. giving out). The clerk does not, by writing it out, signing and sealing it, issue it; and it is doubtful whether he does so by merely delivering it to the attorney for the plaintiff.¹¹⁸

The time within which a valid execution can issue upon a judgment at all, counting either from its entry, or from the test of the last preceding execution, as well as the time within which it may be issued without being awarded on scire facias or by order of court, is quite different in the several states. Where the execution is issued, without award on scire facias, though the year and day had elapsed, well-recognized cases in New York and elsewhere have established the rule that this is only an irregularity, and does not avoid titles arising under the writ.¹¹⁹ Hence, we need not go into the laws of the states fixing the time at which an order upon motion or award upon scire facias is demanded. But it is otherwise when the judgment is barred by limitation. A judgment of a superior court is generally barred or "presumed to be paid" in 20 years from the day of its rendition, or in such period shorter than 20 years as, in some states, is fixed as the bar for ejectments or real actions. It is, in New York,

¹¹⁸ *Pease v. Ritchie*, 132 Ill. 638, 24 N. E. 433 (writ found in clerk's office, marked "not called for," is not issued). But under the peculiarly loose practice of Pennsylvania it was held, in an early case, that, an execution having once been issued, though not returned, and which might never have come to the sheriff's hand, a subsequent writ might be made good by fictitious continuances, the entry, "Vice comes non nisi breve," being set down each term. *Lewis v. Smith*, 2 Serg. & R. 142. It was shown that, under the English practice, this could only be done when the first execution was returned.

¹¹⁹ *Jackson v. Delancy*, 13 Johns. 537; *Jackson v. Robins*, 16 Johns. 537; *Perkins v. Brierfield Iron & Coal Co.*, 77 Ala. 403; *Leonard v. Brewer*, 86 Ala. 309, 5 South. 306; *Martin v. Prather*, 82 Ind. 535; *Yeager v. Wright*, 112 Ind. 230, 13 N. E. 707; *Beale v. Botetourt*, 10 Grat. 278 (which is misquoted in *Laidley v. Kline*, 23 W. Va. 565, as deciding that execution issued more than 10 years after last preceding is not void, but decides it only as to one issuing without sci. fa. after the year and day); *Cottingham v. Springer*, 88 Ill. 90; *Bank of Genessee v. Spencer*, 18 N. Y. 150. *Gottlieb v. Thatcher*, 151 U. S. 271, 14 Sup. Ct. 319, gives some color to the claim that execution on a dormant judgment is void, by sustaining one issued after the year on the ground that it had been so long stayed by supersedeas, but is hardly intended even as a dictum to that effect.

20 years from the time when execution could first have been issued, or from the last payment made by the defendant; and such is also the length of time allowed in Pennsylvania, New Jersey, Maine, Massachusetts, Wisconsin, Rhode Island, New Hampshire, Indiana, Iowa (as to courts of record), Delaware, South Carolina, Florida, Missouri, North and South Dakota, and Alabama; and in Ohio, like an ejectment, 21 years.¹²⁰ In one respect Virginia gives the longest term for enforcing a judgment,—that is, 10 years after the return day of a prior execution which is not returned, and 20 years after the return day of an execution which is returned by the officer, though such return be irregular; while in West Virginia it is 10 years from the return day of the preceding execution, no matter whether it was returned or not.¹²¹ In Illinois, though the judgment is good for 20 years, as a debt, another clause of the law says distinctly that land can be levied upon only under an execution that has been issued within 7 years, and it must be sold within the eighth, and this clause has been faithfully carried out by the courts.¹²² In Kentucky, on the other hand, the bar of 15 years is reckoned from the day of the

¹²⁰ New York, Code Civ. Proc. § 376. For Pennsylvania, see Wheelen v. Phillips, 140 Pa. St. 3, 21 Atl. 239, and Act May 19, 1887; New Jersey, Practice, 201; Maine, c. 81, § 90; Wisconsin, § 2968; Massachusetts, c. 197, §§ 1, 23; New Hampshire, c. 217, § 4; Rhode Island, c. 205, § 4 (limitation on action of debt); Missouri, § 6796 (presumption of payment, which may be rebutted by partial payment or written acknowledgment); Delaware (on common-law principle of payment presumed after 20 years, neither the statute of limitations nor the sections on scire facias name any particular time); Indiana, Rev. St. § 305; Iowa, § 2529, subd. 6; Florida, § 1204, subd. 1; South Carolina, Code Civ. Proc. § 111; Ohio, Rev. St. § 5368. Though a justice's judgment can be sued on in New York only within 6 years, when docketed with the county clerk it will sustain an execution much longer, probably for 20 years. *Waltermire v. Westover*, 14 N. Y. 16; *Townsend v. Tolhurst*, 57 Hun, 40, 10 N. Y. Supp. 378, distinguishing *Dieffenbach v. Roch*, 112 N. Y. 621, 20 N. E. 560. None of the states other than New York allow the 20 years from the last payment. It is simply "from the rendition of the judgment." Alabama, Code, § 2913, subd. 3; Dakota Territory, Code Civ. Proc. § 53, subd. 1.

¹²¹ Virginia, Code, §§ 3577, 3578 (*Hamilton v. McConkey's Adm'r*, 83 Va. 533, 2 S. E. 724); West Virginia, c. 139, §§ 10, 11. See *Laidley v. Kline's Adm'r*, supra, note 119; *Sherrard v. Keiter*, 32 W. Va. 144 (judgment revived by scire facias after more than 10 years, but less than 10 from last execution).

¹²² Illinois, c. 83, § 25, and c. 77, § 6; *Tenney v. Hemenway*, 53 Ill. 97; *James v. Wortham*, 88 Ill. 69; *Conwell v. Watkins*, 71 Ill. 488.

judgment, or from the date of the last execution issued upon it.¹²³ The life of a judgment in Connecticut is 17 years from its entry;¹²⁴ in Maryland and the District of Columbia, 12 years;¹²⁵ in Oregon, 10 years from the entry of judgment; so, also, in North Carolina, in Tennessee, in Michigan, in Minnesota, and in Arkansas;¹²⁶ in Vermont, 8 years;¹²⁷ in Georgia, practically, 10 years from the entry or from the last execution (that is, 7 years during which the judgment is alive, and 3 more while it is dormant and may be revived);¹²⁸ in Mississippi and in New Mexico, 7 years;¹²⁹ in Kansas, 6 years (that is, 5 years alive and 1 year dormant);¹³⁰ in Washington, Colorado, Idaho, Nevada, and Montana, 6 years;¹³¹ in California, Utah,

¹²³ Since 1866. See *Lockhart v. Yeiser*, 2 Bush (Ky.) 231. A suit to enforce the judgment may in some cases be delayed beyond the 15 years. As to the execution, *quære*.

¹²⁴ Only by analogy to the limitation of suits on bonds. Connecticut, Gen. St. § 1370. Where land has been attached on mesne process, execution must be sued out within 4 months from judgment.

¹²⁵ Maryland, Pub. Gen. Laws, art. 57, § 3, from Act 1729, c. 24, §§ 21, 22, in force in the District. The 12 years are capable of extension.

¹²⁶ Oregon, Code Proc. § 5, and see section 295 (judgment becomes dormant unless execution issues within first year); North Carolina, Code, § 152; Tennessee, § 3473; Michigan, § 8719 (but justices' judgments are good for 6 years under section 6976); Minnesota, c. 66, § 5; Montana, Code Civ. Proc. § 312; Arkansas, § 4487 (which applies to justices' judgments, *Hicks v. Brown*, 38 Ark. 469). Intermediate executions or payments make new rests. *Lindsay v. Merrill*, 36 Ark. 549. In *Cannon v. Laman*, 7 Lea (Tenn.) 513, an execution issued more than 10 years after judgment was quashed, although the record showed intermediate executions and partial payments, and it was admitted that a suit on the judgment would not have been barred.

¹²⁷ Vermont, R. L. § 956 (actions of debt or scire facias).

¹²⁸ Code, § 2914, which has been passed upon in many cases. As to what is sufficient entry or return by sheriff, e. g. receipt of the fi. fa., *Hatcher v. Gammell*, 49 Ga. 576; or agreement by parties indorsed, *Ellis v. Atlantic & G. R. Co.*, 61 Ga. 362. The war time is not counted out. *Chambliss v. Phelps*, 39 Ga. 386. For execution that is lost, see *Mosely v. Sanders*, 76 Ga. 293.

¹²⁹ Mississippi, Code. Compare §§ 2743 (no execution to issue after seven years, etc.) and 2750 (keeping lien alive for seven years, exclusive of time while the judgment is superseded or enjoined).

¹³⁰ Kansas, Gen. St. pars. 4533, 4537, 4542 (worked out from these sections); *Baker v. Hummer*, 31 Kan. 325, 2 Pac. 808; *Angell v. Martin*, 24 Kan. 335.

¹³¹ Colorado, St. § 2163, Code Prac. § 207; Idaho, Gen. St. § 4051, subd. 1; Nevada, Gen. St. § 3644; Montana, Code Civ. Proc. § 41.

Arizona, and Wyoming, 5 years.¹³² In Texas the judgment becomes dormant in 12 months, but if an execution has issued within that time it remains alive for 10 years.¹³³ In Nebraska the statute of limitations does not say anything about domestic judgments. These become dormant in 5 years, but may be revived; there is no limit to the time within which they may be revived. Hence, it is hard to say whether any execution could be treated as void for being sued out too late, unless it be after 20 years.¹³⁴ It often happens that an execution is apparently satisfied by the sale of, or by "setting off," real estate, but by some defect in the proceedings its fruits are destroyed. The law gives, in such instances, the same time for issuing another writ as if there had been a return of no property found; and the bar will run from the time when the satisfaction was set aside by the judgment of the court.*

An execution may issue too soon, as well as too late. But when the judgment has once been entered, the number of days thereafter given, by statute or rule of court, before execution can regularly be made out are a sort of respite to the defendant, and he alone can complain, by motion to quash, if the execution issues before the time expires. It is never held void on such a ground, nor can its priority be assailed by other creditors or incumbrancers.¹³⁵ But when a

¹³² California, Code Civ. Proc. § 336. It was held, in *Bowers v. Crary*, 30 Cal. 621, that, in the enforcement of a mortgage, the five years run from the first judgment, and not from the ascertainment of the balance after applying the proceeds of sale. Arizona, Rev. St. § 2319 (sci. fa., or action on judgment five years from its date).

¹³³ Texas, Rev. St. art. 1664.

¹³⁴ Nebraska, Consol. St. §§ 4546, 4998; *Hunter v. Leahy*, 18 Neb. 81, 24 N.W. 680; *Creighton v. Gorum*, 23 Neb. 502, 37 N.W. 76. There is hardly any express authority that an execution is void, on collateral attack, when taken out after the judgment is barred by limitation; but, considering that the issuing and levying of an execution, and the sale of land under it, are not the acts of a court, but only of the plaintiff, and of ministerial officers who act under his direction, the writer cannot see why such acts, by which lands may be acquired in satisfaction of a former debt which no longer exists for any effective purpose, should be maintained. The clerk, in issuing the execution, certainly (sometimes, even, the sheriff, in levying it) violated his duty.

* *Fairbanks v. Devereaux*, 58 Vt. 359, 3 Atl. 500.

¹³⁵ *In re Hanika's Estate*, 138 Pa. St. 330, 22 Atl. 90; *Waldrop v. Friedman*, 90 Ala. 157, 7 South. 510.

judgment is entered pro forma on a general verdict, and is suspended by motion for a new trial, and an execution goes out while the judgment is not in force, it may certainly be said to be "improvidently issued," and ought to be held void, as much as an execution which is based on a verdict alone without any judgment.¹³⁶

Much more serious questions arise when one of the parties to a judgment dies before the execution is placed in the officer's hands, especially if it be the only defendant; or, what comes to the same, that one of several defendants whose land is levied on or bound by the writ. The change in the property by the owner's death cannot be ignored. The law has its own policy as to the disposition of the decedent's lands among his heirs, his family, his creditors, which cannot be set aside by the plaintiff, in conjunction with the clerk and sheriff.¹³⁷ Whatever process the law furnishes for subjecting the decedent's lands to a judgment rendered against him must be followed. We have seen, however, in the preceding section, that in three-fourths of the states the judgment, either by itself, or by the aid of docketing or registry, becomes a lien on the defendant's land, and that such a lien is not, any more than one arising by deed, removed by the owner's death. Yet, even in these states, no execution to enforce the lien can be issued after the defendant's death;¹³⁸ at least, not, if by the course of practice, it is dated, or, in the old phrase, if it is "tested" after such death. The old English habit of

¹³⁶ *Windsor v. Tillottson*, 135 Pa. St. 208, 19 Atl. 817. Quære, are the levy and sale made under such executions void? But an execution (it was a "mortgage execution") which goes on while the record is destroyed by fire, and not yet replaced, is not good. *Davidson v. Beers*, 45 Kan. 365, 25 Pac. 859. Execution issued on verdict without judgment cannot be cured by *nunc pro tunc* judgment, after adverse interests have arisen. *Ninde v. Clark*, 62 Mich. 124, 28 N. W. 765. Under the loose manner of making up the record in Pennsylvania, the entry, "Judgment," without stating its amount, was held not to be interlocutory, but equivalent to a final judgment in terms. *Lewis v. Smith*, 2 Serg. & R. 142.

¹³⁷ *Bull v. Gilbert*, 79 Iowa, 547, 44 N. W. 815. *Windsor v. Tillottson*, 135 Pa. St. 208, 19 Atl. 817.

¹³⁸ "If there be judgment against one who has land in fee, or such a one acknowledge a statute, and die, and his lands descend to his heir, execution may be taken against his heir" (the necessity for a *scire facias* being shown elsewhere). *Bac. Abr.* "Execution," G, 2. See, also, *Co. Litt.* 103, 290; *Bull v. Gilbert*, 79 Iowa, 547, 44 N. W. 815.

testing executions on the first day of the term, though they be issued in fact on a later day, or in the following vacation, is still kept up in the states of North Carolina and Tennessee. The fiction by which it carries its force and effect back to that day, though the defendant have died between it and the true time of issual, has been enforced in very late cases, and is supported by the high authority of the supreme court of the United States.¹³⁹ But if the sale cannot proceed without a writ of venditioni exponas, and this writ is tested after the defendant's death, the sale depending upon it is void, though the supreme court in one decision regarded the subsidiary writ as on a different footing, treating it rather as a writ in rem than in personam.¹⁴⁰ There are, however, states in which execution may issue after the defendant's death, and where his lands may be seized and sold under it in the hands of his heirs or executors.¹⁴¹

When the sole plaintiff, or all the plaintiffs, have died after judgment, his death or their deaths operate only as an assignment of the judgment to the personal representatives; and the revivor by scire facias or other statutory step (in Kentucky, a simple affidavit by the administrator, with copy of his appointment, laid before the clerk, is enough) seems to be a matter of form rather than of substance; yet it has been held that an execution issued in the dead

¹³⁹ *Aycock v. Harrison*, 65 N. C. 8; *Preston v. Surgoine* (Tenn.; 1823) Peck, 72 (there is a strong dissenting opinion); *Ward v. Southerland*, Peck (Tenn.) Append. 1; *Battle v. Bering*, 7 Yerg. 533; *Anderson v. Taylor*, 6 Lea, 383; *Smith v. Whitfield*, 67 Tex. 124, 2 S. W. 822. The Tennessee cases sustaining the fiction of the teste are hard to reconcile with the statute directing the clerk and sheriff to mark the true date on the writ. *Mitchell v. St. Maxent*, 4 Wall. 237 (execution tested after defendant's death is void). Case distinguished from *venditioni exponas*, *Taylor v. Doe d. Miller*, 13 How. 287, *infra*. "The execution is treated as if actually issued on the day of its teste, and the death of the plaintiff or defendant subsequent to its teste had no other effect than if it had occurred after the actual issuing of the writ." In this case the land had been attached, and the execution was a special one for the attached land; but this did not save it from nullity. So, also, *Wallace v. Swinton*, 64 N. Y. 188, under Code of Civil Procedure, to which fictions as to date are unknown.

¹⁴⁰ *Samuel v. Zachery*, 4 Ired. (N. C.) 377; *Overton v. Perkins*, 10 Yerg. 328; contra, *Taylor v. Doe*, 13 How. 287 (coming up from Florida).

¹⁴¹ So in Florida, by section 1918, Rev. St. 1892; at least, such seems to be the meaning.

plaintiff's name is void, and does not confer any title upon the purchaser.¹⁴²

§ 167. A Valid Execution.

There being a valid judgment or its equivalent (bond or recognizance), and an execution issued in proper time, we next have to look to its outer and inner form for its validity. It must in all cases be signed by the clerk or prothonotary of the court of record upon the judgment of which it is based, or the clerk in whose office the transcript of an inferior court is filed; but it may be signed by a deputy, who should in all cases sign the principal's name, and should regularly add thereto, "by [his own name], Deputy Clerk."¹⁴³ When the court has been discontinued, the execution is issued from the clerk's office, to which the records have been transferred.¹⁴⁴ The character of the clerk or prothonotary must be added. Regularly it should be, "Clerk of ———," with the name of the court; but, as the name of the court necessarily appears in the body of the execution, the word "clerk" alone would sufficiently indicate the character of the officer. Whether such abbreviations as "C. J. C. C." for "Clerk of the Jefferson Circuit Court," are sufficient, is a matter on which the authorities are not fully agreed; but the weight of authority is in favor of the validity of such a writ.

In Kentucky the official signature of every officer goes throughout the state, and in North Carolina within his county, without the seal. In all other states every writ must regularly have the seal of the

¹⁴² This matter is in almost every state regulated by statute. Compare *Amyx v. Smith Adm.*, 1 Metc. (Ky.) 520, where the statute was not complied with, and execution issued on behalf of the dead plaintiff.

¹⁴³ In Nova Scotia the seal of the court dispenses with the signature. *Archibald v. Hubley*, 18 Can. Sup. Ct. 110. But the American rule requires both means of authentication. *Hernandez v. Drake*, 81 Ill. 34. Signature by clerk de facto good, *Blount v. Wells*, 55 Ga. 282. Where the writ bears the proper "style," teste, and seal, it is not avoided by the deputy clerk's signing it only in his own name. *Griswold v. Connolly*, 1 Woods, 193, Fed. Cas. No. 5833.

¹⁴⁴ Which is the proper clerk's office under given circumstances is discussed in *Richards v. Belcher*, 6 Tex. Civ. App. 284, 25 S. W. 740; *Needles v. Frost* (Okla.) 35 Pac. 574; *Bailey v. Winn*, 113 Mo. 155, 20 S. W. 24. In *Pendleton v. Smith*, 1 W. Va. 16, a writ of attachment signed by the deputy in his own name was held to be bad.

court; in North Carolina every writ directed to another county than that of its origin. Its absence here is more serious than in a summons, which in its purpose is nothing but a notice; while a fieri facias, by which the citizen's property can be taken from him against his will, is the highest exercise of sovereign power. And the seal should have a device, authorized by law, and distinguishing it from all other seals. This device being known, the private seal of the clerk or a scroll cannot take its place.¹⁴⁵ Yet the courts of several states have held that the seal, when the writ is otherwise authenticated, is a form of little moment, that it may be supplied by amendment, and that its absence does not render a levy or sale under the writ void.¹⁴⁶ But in new and growing states new counties are formed, with new courts. To devise a seal, and to have it engraved, is not the most pressing duty of judge or clerk; and as long as no device for the seal has been ordered, any seal impressed on paper or wafer, perhaps even a mere scroll, might be sufficient.¹⁴⁷

Another form is required by the constitutions of almost every state, namely, that process shall run in the name of the commonwealth, the state, the people, as in England it runs in the name of the queen. An execution or attachment not headed in the name of the sovereign authority would be nothing but the command of the clerk who signs it. Yet it is the better opinion that an omission or misstatement as to the sovereign is amendable, and does not render the writ or a sale under it void.¹⁴⁸

¹⁴⁵ *Taylor v. Taylor*, 83 N. C. 116 (execution without seal sent to other county is void), following *Finley v. Smith*, 4 Dev. 95. The decisions are at common law. The North Carolina statute of 1797 only dispenses with the seal within the county, but does not enjoin its use elsewhere. *Hernandez v. Drake*, *supra* ("the signature is as essential as the seal," the need for the latter being thus conceded). *Bryant v. Johnson*, 24 Me. 304 (the seal proves the authority given by the court).

¹⁴⁶ *Warmoth v. Dryden*, 125 Ind. 355, 25 N. E. 433; *Rose v. Ingram*, 98 Ind. 276 (sale under it not void); *Freem. Ex'n's*, § 46; *Arnold v. Nye*, 23 Mich. 286 (not void for want of seal).

¹⁴⁷ *Wehrman v. Conklin*, 155 U. S. 318, 330, 15 Sup. Ct. 129 (though the clerk of the new county had time enough to provide a seal).

¹⁴⁸ *Yeager v. Groves*, 78 Ky. 278, stands perhaps alone. *Hibberd v. Smith*, 50 Cal. 511 (execution not in the name of "The People" amendable, and sale not void); *Park v. Church*, 5 How. Prac. 381; *State v. Cassidy* (S. D.) 54 N. W.

The date seems to be an important part, and would be indispensable where the return day is fixed only as being so many days or months from the date; but when the return day is clearly stated by year, month, and day, the omission of the date would not render the execution void, and the blank might be filled according to the facts as appearing from the sheriff's indorsements, or from the execution docket.¹⁴⁹ An omission of any return day, it seems, would be fatal; but the casual omission of some word in the designation of that day leaving enough to show the officer which of the regular return days is meant is immaterial.¹⁵⁰

The "teste" of an execution in the old form gives the name of the judge, or, among several, of the chief or presiding judge of the court, in which the judgment is rendered.¹⁵¹ In many states this form has been dropped in modern practice. But in the states which have retained the "teste" of writs, an error in the teste, or even its omission, is not fatal to the validity of the writ.¹⁵²

The most important part in the execution is the statement of the sum, and any real uncertainty in that would be fatal. But when the word "hundred" in the number of dollars, before the tens and units, is omitted, it may be supplied from the figures on the back of the writ. Where there are credits in the judgment, it is an old, rather slovenly practice in many courts, to indorse them only on the back of the writ; and the failure to state them on its face is not a fatal variance; while it seems that the failure to give in or on

928 (where after admission of the state an execution was by mistake headed "The Territory of Dakota"). Process from the federal courts always runs in the name of "The President of the United States"; but this is not a constitutional requirement, and a change from it would be immaterial.

¹⁴⁹ Mooney v. Moriarty, 36 Ill. App. 175. Execution not void because the return day is set too late, Brevard v. Jones, 50 Ala. 221. In Norris v. Sullivan, 47 Conn. 474, an alias was by mistake dated like the first writ, and made returnable in 60 days. The action had thus thrown beyond the return day, but held good on proof of the true date.

¹⁵⁰ Henderson v. Zachry, 80 Ga. 98, 4 S. E. 883.

¹⁵¹ People v. Van Hoesen, 62 How. Prac. 76; Douglas v. Haberstro, 88 N. Y. 614.

¹⁵² Warder v. Millard, 8 Lea, 581. The word "teste," at common law, also includes the date, which was not always truly stated. See below, where defendant dies between teste and true date.

the execution credits arising after judgment is amendable, and does not render the execution void on collateral attack.¹⁵³

The execution must agree with the judgment on which it is based. It has been held that an execution issued in favor of A alone on a judgment recovered by A and B jointly is void, and that a sale of land under it does not pass the title.¹⁵⁴ More important even is a close pursuance of the judgment as to defendants. If the recovery is against a firm only, though there is a recital of its membership, an execution against the several partners, on which their individual lands can be sold, is void, being unsupported.¹⁵⁵ An execution issued

¹⁵³ *Bogle v. Bloom*, 36 Kan. 512, 13 Pac. 273; *Peet v. Cowenhoven*, 14 Abb. Prac. 56 (credit not given, but land sold for less than really due, sale not void). In *Prescott v. Prescott*, 62 Me. 428, an execution was held void for an excess of \$2.40. It is not usual to compute interest in the writ; but where it is done an error of less than 1 per cent. will not render it void. *Coffin v. Freeman*, 84 Me. 535, 24 Atl. 986. Not void for ordering illegal commissions, *Hollister v. Giddings*, 24 Mich. 501; contra, *Fairbanks v. Devereaux*, 48 Vt. 550 (the writ must show on its face of what part of the judgment "execution is yet to be done"). This, however, was not on collateral attack, but in *audita querela*.

¹⁵⁴ *Newsom v. Newsom*, 4 Ired. 381 (judgment in favor of A, suing by B. guardian; execution in favor of B, guardian, held void); *Crittenden v. Leitensdorfer*, 35 Mo. 239 (mistake in names of parties and in amount void); *Cleveland v. Simpson*, 77 Tex. 96, 13 S. W. 851. Variance in middle name is immaterial, unless there is another person with the wrong middle name. *Hicks v. Riley*, 83 Ga. 332, 9 S. E. 771. But change in corporate name from that in judgment is fatal. *Bradford v. Water Lot Co.*, 58 Ga. 230. Misrecital of parts of judgment not affecting doings under the writ immaterial. *Davis v. Kline*, 76 Mo. 310; *Bachelor v. Chaves* (N. M.) 25 Pac. 783. Judgment below merged in that of appellate court, latter must be followed. *Thomason v. Gray*, 84 Ala. 559, 4 South. 394. Where execution is amended to conform to judgment, the lien only attaches from time of amendment. *Bradley v. Sadler*, 57 Ga. 191. Where the year of the judgment is left blank, that of the execution is presumed. *Stevens v. Roberts*, 121 Mass. 555. The common-law form of the writ requires no detailed recital, but only "lately recovered in our —— court, whereof said C. D. stands convict, as appears to us of record." Execution in plaintiff's name is good, though judgment assigned. *Corriell v. Doolittle*, 2 G. Greene (Iowa) 385. Such a variance, as omission of interest given by the judgment, being for defendant's benefit, does not avoid the writ. *Brace v. Shaw*, 16 B. Mon. 43.

¹⁵⁵ *Battle v. Guedry*, 58 Tex. 114 (writ against P. B. C., on judgment against I. P. C.); *Clayton v. May*, 68 Ga. 27 (judgment against firm). But the execution is good against the defendant correctly named. *Blake v. Blanchard*, 48 Me. 297. And the omission of one defendant was held not to avoid proceedings against those named. *Wilson v. Nance*, 11 Humph. (Tenn.) 189.

after the defendant's death, whether against him by name or against his heirs or executors, is void, although the judgment be a lien on his real estate. The law in some states provides for a revivor by scire facias or otherwise, while in other states the judgment must be "proved against the estate."¹⁵⁶

It is irregular to issue a new execution of fieri facias (known as an "alias" or "pluries") while a former writ is not returned, or while property levied upon is unsold, but still under levy. The proper course to dispose of such property is by a writ of venditioni exponas. But to issue a new writ instead has been held irregular only. The writ is not a nullity, and a sale under it not void; though the lien of the former execution might be lost by such a course.¹⁵⁷ The venditioni gives no authority to sell any property not recited therein as being already levied on. A sale made thereunder of any additional land or goods is void.¹⁵⁸ Where the judgment is for the sale of specific property (as in those states which have substituted the "mortgage execution" or "special execution" for the copy of decree, under which a master sells under the old chancery practice), or where it condemns heirs or devisees to pay out of the assets descended, the execution should be in the nature of a venditioni; and if in place thereof a writ should be issued in the ordinary form, directing a levy on and sale of any property of the defendant, the writ would be void, though nothing else should be sold under it than what the judgment directed.¹⁵⁹

We are here interested only in such defects of an execution as

¹⁵⁶ Hart v. McDade, 61 Tex. 208; Williams v. Weaver, 94 N. C. 134. But the writ is not void as against the living defendants. Stark v. Carroll, 66 Tex. 396, 1 S. W. 188. At common law the writ "tested" before defendant's death, though issued after, was good. Collingsworth v. Horn, 4 Stew. & P. (Ala.) 237; Den v. Hillman, 7 N. J. Law, 180.

¹⁵⁷ Kerr v. South Park Commissioners, 8 Biss. 276, Fed. Cas. No. 7,733. Alias issued without plaintiff's order not void. Johnson v. Murray, 112 Ind. 154, 13 N. E. 273.

¹⁵⁸ Maupin v. Emmons, 47 Mo. 304.

¹⁵⁹ Deakins v. Rex, 60 Md. 593; Wright v. Watson, 30 Ga. 648 (under the then law judgment against married women, set out her separate property). Walker v. Marshall, 7 Ired. (N. C.) 1. But the additions "administrator" or "trustee" to the defendant's name, in the judgment, are only a descriptive personæ. Averett v. Thompson, 15 Ala. 678; Hamilton v. Wilder, 31 Vt. 695.

will subject it to collateral attack, and thus destroy the lien on or title in land which would otherwise flow from it; not in such defects for which the execution might be quashed upon motion in the court from which it issued, the court having still control over it.¹⁶⁰

§ 168. When Execution or Attachment Takes Effect.

The title of the purchaser at execution sale relates back to one of three possible times,—one depending on the history of the writ alone; a second, on the judgment lien, where the law gives such lien (which in some states it never does);¹⁶¹ the third, on the time when an attachment sued out before judgment has become a lien on the defendant's land. All states provide for attachments, either as of course, or on ground shown. In some, the land attached is sold under an order drawn like a chancery decree of sale; in others, there is an "attachment execution," like a venditioni exponas at common law. Having heretofore treated of the judgment lien, we shall here discuss at what time an execution or attachment becomes a lien on the defendant's lands, or any particular land, so as to gain precedence of subsequent deeds or of transfers or incumbrances by operation of law, and how and when the lien of the execution may be lost.

Under the older acts (and still in many states), an execution or writ, warrant, or order of attachment "binds the land" of the defendants therein named, in any one county, at the moment when it is placed in the hands of the sheriff of that county, or of such other officer to whom it is directed who exercises the sheriff's powers for

¹⁶⁰ See the difference discussed in *Wright v. Nostrand*, 94 N. Y. 31.

¹⁶¹ Thus, in Nebraska, where the judgment is made a lien, but a stay bond may be given with the effect of a judgment against principal and surety, section 5015, Consol. St., as to priority of executions, might apply to writs when issued against sureties on stay bonds which are not entered in term time, and to which the lien from the "first day of the term," under section 5002, cannot be made to apply. And see below as to attachments. In other states execution sent to "foreign counties," in which the judgment is not docketed, would stand on their own bottom, as to time of taking effect. But Code Civ. Proc. N. Y., § 1365, shuts out the lien of the writ, even in such cases, by forbidding the issue of the execution to any county in which the judgment has not been first docketed.

that purpose within the county;¹⁶² or if it be issued by a circuit or district court of the United States, when it is placed in the hands of the marshal for the district containing the land,—but only within those states in which the execution or attachment from the state court would have such an effect.¹⁶³

But this is by no means the law everywhere. The New England states have set the example of gathering, in the office of the town clerk or register of deeds, everything that affects the title to land within the bounds pertaining to that office. An attachment, in Connecticut, is levied on land by the officer lodging a statement of names, date, amount, etc., with the town clerk of the town in which the land lies; also in Vermont, where the property must be described in the statement, and, the judgment not being a lien, an execution also is levied in like manner.¹⁶⁴ In Maine, Massachusetts, Rhode Island, and New Hampshire, land is subjected in like manner to the attachment, though, in the first-named of these states, a levy made otherwise (say, by indorsement on the warrant) may be perfected within five days by lodgment in the registry of deeds. In Rhode Island, the officer must also, as part of the levy, deliver or mail (as

¹⁶² Kentucky, Gen. St. c. 38, art. 2, § 1 (re-enacted in Sess. Acts 1891-1893), as to executions; Code Prac. § 202, as to attachments; Indiana, Rev. St. § 922, as to attachments with the effect, peculiar to that state, that after one attachment is sued out against the defendant, all others "filed under it" relate back to the time when the first was placed in the sheriff's hands; *Shirk v. Wilson*, 13 Ind. 129; *Lowry v. Howard*, 35 Ind. 170; Virginia, Code, § 3587; West Virginia, Code, c. 140, § 5; Alabama, § 2894 (the lien continuing as long as the writ is regularly reissued and delivered to such officer, without the lapse of an entire term), which still may govern many cases, as the judgment lien act of 1887 does not exclude the lien of an execution, where the judgment has not been docketed. It will be seen that the old plan of letting the writ bind the land from the time of its delivery to the sheriff is now limited mainly to the Southern states, where land has not thoroughly become an article of commerce for which the muniments of title and all incumbrances upon it must be found conveniently together in a single office.

¹⁶³ Rev. St. U. S. § 915, from act of 1872, adopting the practice of the state courts then in force.

¹⁶⁴ Connecticut, Gen. St. § 916; Vermont, §§ 874, 1565, 1567. If the town clerk receives the attachment with indorsed statement, but mislays it, without making any entry, so that one searching the record cannot find it, the attachment loses its force against a bona fide purchaser. *Burchard v. Fairhaven*, 48 Vt. 327.

the case may be) a copy of the writ and return to the defendant, or deliver it to the occupant. In New Hampshire, the copy and return may be left either at the office or at the residence of the town clerk, and, when there is none, with the supreme court clerk for the county.¹⁶⁵

In New York, the "warrant of attachment" is levied on real property by filing a notice of the attachment, which must include a description of the property to be levied upon, with the county clerk of the proper county.¹⁶⁶ The Northwestern states, such as Illinois, Michigan, Wisconsin, and Minnesota, follow the New York plan; i. e. executions only work out the lien of the judgment, while attachments are levied on land by filing a statement in the office in which deeds are recorded.¹⁶⁷ Such is also, in substance, the law of the Far West, e. g. in California, Idaho, Nevada, Washington, and Montana.¹⁶⁸ In Kansas and Nebraska, land, as well as personality, must be formally levied on, on the premises and by a declaration before two witnesses; while in the Dakotas the statute requires a levy of

¹⁶⁵ Maine, c. 81, § 59; Massachusetts, c. 161, § 62; Rhode Island, c. 207, § 12; New Hampshire, c. 220, § 3. To give a lien as against bona fide purchasers, the land must be described in the indorsement. *Ashland Savings Bank v. Mead*, 63 N. H. 435; though it is otherwise valid, *Moore v. Kidder*, 55 N. H. 488.

¹⁶⁶ New York, Code Civ. Proc. § 649, subsec. 1.

¹⁶⁷ Michigan, §§ 7993, 7995, 7996 (no entry on the land is necessary); Wisconsin, § 2737 (the officer need not enter or even come in view of the land); Minnesota, c. 66, § 151, subsec. 1 (copies left with register of deeds and with defendant "without any other act or ceremony"). Fully discussed in *Campau v. Barnard*, 25 Mich. 383. Illinois, Rev. St. c. 11, § 9, makes the filing of the certificate of levy with the county recorder the commencement of the lien against purchasers in good faith. The Wisconsin annotators point out that the lien formerly worked out by the issue of the attachment for three days before levy is no longer in force, not being necessary, as no time need be lost in lodging the attachment in the proper office.

¹⁶⁸ California, Code Civ. Proc. § 542; Washington, Code Proc. § 300, subsec. 1 (description to be left with the recorder of the county). Montana, Code Civ. Proc. § 186, subsec. 1. In Nevada, St. § 3150, besides leaving a copy of the writ, with the description indorsed, with the recorder, a copy must also be left with the occupant, or, if there be none, posted on the land. So in Idaho, where, if there is no occupant, the copy must be left with the defendant or his agent, if in the county, or at the residence of the defendant or his agent.

the warrant of attachment, without pointing out how such levy is to be made.¹⁶⁹ In Maryland, the statute on attachments only says that all property, real and personal, may be seized and attached. It nowhere says that the defendant's property shall be bound by any step earlier than this seizure or levy; but it fails to say how it is to be made, falling back on such common law as there may be on the subject.¹⁷⁰

Aside from exemptions (of which hereafter) the states differ greatly as to the estates in land which may be sold (or, in New England, which may be set off) on execution. Most of the statutes expressly include estates not only in possession, but also in reversion or remainder,—at least, vested remainders. The levy and sale of contingent remainders or executory devises is discouraged; and the latter would, in the states preserving the old nomenclature of estates, not be included in remainders. Estates for years or for life are also made subject as much as estates in fee; and estates subject to a condition may be sold subject to the condition. But there, again, comes up the difference between estates at law and equitable estates. While the latter may generally be subjected by some process to the payment of debts, those states which have a complete system of equity deem it better to subject an equity in land (unless it is a "perfect equity") by decree upon a creditor's bill, or by an order in "proceedings supplementary to an execution."

Thus, under the rule of the New York Revised Statutes abolishing resulting trusts (and this rule, as we have shown elsewhere, has been followed in the legislation of many states), the payment of the consideration by A for a conveyance made to B no longer constitutes the latter a trustee for the former; but the arrangement is a fraud upon A's antecedent creditors. There being no trust, the land cannot be sold under an execution against A, but it may be reached by a bill in equity, or a civil action in the nature thereof,—probably, also, under an attachment taken out at the beginning of an action for debt.¹⁷² What may be called the first law-reform act in the

¹⁶⁹ Nebraska, Consol. St. §§ 4715, 4722; Kansas, Gen. St. par. 4878; Dakota, Code Civ. Proc. § 202.

¹⁷⁰ Pub. Gen. Laws, c. 83, § 3.

¹⁷² New York, Code Civ. Proc. § 1434; *Garfield v. Hatmaker*, 15 N. Y. 475. Quære, whether the Code section changes the law as thus held under the Revised Statutes, though Mr. Throop, in his notes on the Code, thinks it does.

United States was an act passed by the Kentucky legislature, in 1796, by one section of which lands held by one person in trust for another might be levied and sold for the debts of the cestui que trust. From this act the idea was copied by the New York revisors. But this provision has been construed as applying only to a naked express trust, not to equities enjoyed under an active trust,—and even less to the rights of a vendee under an executory contract.¹⁷³

On the other hand, many states allow all kinds of equities in land to be sold under execution, with the inevitable tendency to great sacrifice. The law of Michigan subjects to the execution "all real estate of the debtor, legal and equitable interests in lands acquired by the parties to contracts for the sale and purchase of lands, whether in possession, reversion, or remainder, including lands fraudulently conveyed, with intent to defeat, etc., creditors, and the equities and rights of redemption" created by the execution law itself. Thus, the right of the vendor retaining the title may be sold as an interest in land, as well as the vendee's right.¹⁷⁴ The opening words of the statute subjecting land to execution will generally indicate whether an equitable interest will pass under an execution or not.

It seems more just and fair all around to decide the question of a trust resulting to the creditors first, before selling the land at a sacrifice.

¹⁷³ Kentucky, St. 1894, § 1681, subjects the legal estate to execution. Section 2352 subjects trust estates to the debts of the beneficiary. Under the act of 1796 (Mor. & Por. p. 443), slaves conveyed to A for B's use were sold under execution against B. *Samuel v. Elliss*, 12 B. Mon. 479. It was said in *Crozier v. Young*, 3 Mon. 159, that land held in express trust might be sold. Even aside of the statute, lands held by entry or survey, without patent from the commonwealth, were sold, *Thomas v. Marshall, Hardin*, 22; *Moore v. Simpson*, 3 Metc. (Ky.) 351. Perhaps, under the present law, equities could be reached only by creditors' bill or by attachment and order of sale.

¹⁷⁴ Michigan, How. Ann. St. § 6108; *Doak v. Runyan*, 33 Mich. 75 (vendor's rights); *Welsh v. Richards*, 41 Mich. 593, 2 N. W. 920; *Kercheval v. Wood*, 3 Mich. 509 (lands bought from state school fund, paid in part and not patented). Where all execution sales are subject to redemption, a sale of an uncertain equity at execution is not so disastrous. Pennsylvania, which but lately adopted equitable proceedings in any form, has, of necessity, allowed all sorts of equitable estates to be sold under the common-law writ.

§ 169. Exemption—The Homestead.

About the middle of the nineteenth century the feeling began to gain ground throughout the United States, but mainly in the West, that every family should have an opportunity to obtain a homestead, and should have the right to hold it, when obtained, against all the consequences of thriftlessness of the head of the family. This feeling led, on the one hand, to the homestead laws of the United States, under which tracts not exceeding 160 acres are granted free of price to any head of a family who has lived upon and cultivated such a tract for five years, and it led also to the homestead exemption laws of many of the states.¹⁷⁵ Under these laws a quantity of land and buildings is exempted from levy under execution, attachment or other process against the owner, the quantity being defined either by area, or by value, or both, and known in the laws as the "homestead," though its occupation as such is not everywhere a requisite of its exemption. The exemption is, by each of these laws, conferred only upon a resident of the state, and in most of them only upon the "head of a family," or person with a family, or person having others dependent upon him, while in a few states the exemption is open to all alike, without regard to their family obligations.

Thus, in Alabama, every homestead, not exceeding 80 acres, and the dwelling and appurtenances thereon, to be selected by the owner, and not in a city, town, or village, or in lieu thereof any lot in a city, town, or village, with the dwelling, not exceeding \$2,000 in value, is exempt.

In Arkansas the homestead of any resident, outside of a city or village, if owned and occupied as a residence, shall not exceed

¹⁷⁵ The first homestead exemption seems to have been that of Wisconsin, enacted in 1849. New York followed in 1850; many of the Northern and Northwestern states before the war. The states "lately in rebellion," upon their return to the Union, made very liberal exemptions of land, both in value and in area, and guarantied them in their state constitutions. Kentucky, West Virginia, and Missouri fell into line about the same time. The newer states of the far West started out with the homestead exemption as a part of their procedure. The exemption laws are all now old enough to leave very few debts contracted before the enactment of the laws, and excepted from their operation.

160 acres, with the improvements, to be selected by the owner; in a city or village it shall not exceed one acre nor \$2,500 in value; but in no case is it to be less than one-fourth of an acre.

In California the homestead consists of the dwelling house in which the claimant resides and the land on which it stands, selected by the owner. If he is a married man, he may select it either from the community, or from his own separate property, or, with the consent of his wife, from her separate property.

In Colorado every householder, being the head of a family, has his homestead, not exceeding \$2,000 in value only while occupied by him or family.

In Connecticut any person owning and actually occupying a building, and any other real estate used in connection therewith may claim it as a homestead to the extent of \$1,000 in value, if it is either designated as his homestead in the conveyance under which he holds it, or if he has caused his declaration to that effect to be recorded like a deed.

In Florida any person, the head of a family, may make a statement in writing and select, in all, 160 acres, which may or may not include his residence, at his option, and need not include any land of which the title is defective. A leasehold may be thus selected.

In Georgia the head of a family, the guardian or trustee of a family of minor children or an aged or infirm person, or a person having the care of dependent females of any age, may select real and personal property, not exceeding \$1,000 in value. The land may be situated in several parcels, or in one or more counties.

In Illinois a householder having a family has a homestead to the extent of \$1,000 in value in the farm or lot of land and buildings thereon, by lease or otherwise, owned and occupied by him.

In Idaho the only limit is that of value; \$5,000 for the head of a family; \$1,000 for any other person,—in either case a resident. The statute in very plain words prescribes a recorded declaration of the homestead as a requisite for the right of exemption.

In Iowa every family is entitled to a homestead, whether owned by the husband or the wife, exempt from judicial sale. It may be made up of one or more lots or tracts of land, with the buildings and other appurtenances; must not exceed 40 acres outside of any platted town, nor half an acre if within it, unless a greater area is

needed to make up the value of \$500. There must be only one dwelling house, but a shop not exceeding \$300 in value, in which the occupant carries on his business, may also be included.

In Kansas, under the constitution, a homestead to the extent of 160 acres of farming land, or of one acre within the limits of an incorporated town or city, occupied as a residence by the family of the owner, together with all the improvements, is exempted from forced sale under any process of law, except for taxes, for obligations contracted in its purchase, or in erecting the improvements.

In Kentucky any actual, bona fide householder with a family is entitled to a homestead in so much land, including the dwelling house and appurtenances owned by the debtor, as does not exceed \$1,000 in value. This is exempt from all debts except such as were contracted before the "purchase" of the land, or the erection of the homestead thereon, or for the purchase or improvement thereof.

In Massachusetts every householder having a family is entitled to an "estate of homestead," to the extent of \$800, in a farm or lot and buildings thereon, owned or rightly possessed, by lease or otherwise, and occupied by him as a residence; only, however, when designated as a homestead in the conveyance to the debtor, or when he has put on record a written statement to that effect.

In Michigan a homestead of not exceeding 40 acres, with the dwelling house and appurtenances, to be selected by the owner and not included in any recorded town plat, or city, or village, or in lieu thereof a lot in any such town, etc., with dwelling house and appurtenances, owned and occupied by any resident of this state, shall not be subject to forced sale. It must not exceed \$1,500 in value; otherwise, it is to be sold, and this sum to be returned to the owner.

In Minnesota a homestead of not exceeding 80 acres with the dwelling house and its appurtenances, to be selected by the owner outside of the platted part of any town, city, or village, or in place thereof not more than one lot in a town, etc., of over 5,000 inhabitants, or one-half acre, with the dwelling house and its appurtenances, owned and occupied by any resident of the state, is exempt.

In Mississippi (under the constitution) every citizen of the state, male or female, being a householder and having a family, holds exempt from seizure and sale the land and buildings owned and occupied by him as a residence, not exceeding 160 acres nor \$2,000 in

value; if in a city, town or village, land occupied as a residence and to the same value.

In Missouri the homestead of every housekeeper or head of a family, consists of the dwelling house and appurtenances and the land used in connection therewith as such homestead,—in the country, not exceeding 160 acres, nor \$1,500 in value; in cities of more than 40,000 inhabitants, not exceeding 18 square rods, nor \$3,000 in value; in cities with more than 10,000 and less than 40,000 inhabitants, not exceeding 30 square rods, nor \$1,500 in value; in smaller towns, not exceeding 5 acres in area, nor \$1,500 in value.

In Montana a homestead of not more than 160 acres of farming land, with the dwelling house and appurtenances, to be selected by the owner, not within any platted town, city or village, or, at his option, land not exceeding one-fourth of an acre within it, owned and occupied by any resident of the state, in neither case exceeding \$2,500 in value, is exempt from forced sale.

In Nebraska every head of a family (i. e. either the husband, or a person who has with him and under his care and maintenance a minor child, stepchild, minor niece or nephew, parent or grandparent of self or of wife or husband, or an unmarried sister or other of the named relatives unable to support themselves) may select a homestead, not exceeding \$2,000 in value, containing the dwelling in which he resides, and not more than 160 acres, or, instead thereof, a quantity of contiguous lands, not exceeding two lots, within a city, town, or village. With the consent of the wife, he may select the homestead from her land.

In Nevada any quantity of land, including the dwelling, which does not exceed \$5,000 in value (estimated in gold coin), is free from forced sale for any debt or liability, except for the purchase money, or for improvements thereon, or taxes. The land is to be selected by husband and wife, or either of them; but if it is the separate property of either spouse, both of them must join in the written declaration.

In New Hampshire every person is entitled to \$500 of his homestead, or of his interest therein, as a homestead right. The owner, wife or husband of the owner, and minor children are entitled to occupy the "homestead right" during the life of the owner. When the homestead is worth more than \$500, this sum is paid to the debt-

or, or to his wife or her husband, or the guardian of the children, as such debtor may agree in writing.

In New Jersey an act of 1852 constitutes the lot and buildings thereon that are occupied as a residence and owned by the debtor, when he is a householder and has a family, to the extent of \$1,000 in value, his homestead free from legal process; and no previous waiver or release is valid. But the law has been a dead letter, because it not only requires that the conveyance to the debtor, or a recorded statement, should designate the homestead as such, but also that a descriptive notice should be published for six weeks in a newspaper of the county. No case under this homestead law is found in the New Jersey Reports.

In New York a lot of land, with one or more buildings thereon, not exceeding in value \$1,000, owned or occupied as a residence by a householder having a family, and designated as an exempt homestead as prescribed by law, is exempt from forced sale, unless the judgment was recovered wholly for a debt contracted before the designation of the homestead or for the purchase money thereof. The homestead should be designated as such in the conveyance to the owner, or he may file a written notice, fully describing it, in the office of the county clerk.

In North Carolina, under the constitution, as to all debts contracted since April 24, 1868, the homestead and the dwelling house and buildings used therewith, not exceeding \$1,000 in value, to be selected by the owner, is exempt. Under the law different tracts or parcels, not contiguous to each other, may be included in the same homestead.

In North and South Dakota the homestead of every resident family, whether owned by the husband or wife, as long as it retains its character, is exempt from judicial sale, judgment lien, and all process; but it is liable for the taxes thereon, mechanic's lien for the work and material thereon, and for the purchase money. It must embrace the residence, consist only of contiguous tracts, must not comprise more than one dwelling house, except a shop used by the occupant in his business. It must not exceed 1 acre in area if within a town plat, nor 160 acres if without. It may be selected and marked beforehand, or claimed after levy. No limit is named as to value.

In Ohio, the husband and wife living together, a widow or widow-

er living with an unmarried daughter or with a minor son, may hold exempt from sale a family homestead, not exceeding \$1,000 in value. The wife may demand it if the husband does not; but neither can if the other has a homestead which is exempt.

Under the constitution of South Carolina a homestead in land, whether held in fee or by any lesser estate, not exceeding \$1,000 in value, is exempt to the head of every family residing in the state, to be set off by the sheriff when he comes to sell the land.

In Tennessee, under the constitution, the homestead in real estate in possession of or belonging to each head of a family, and the improvements thereon to the value of \$1,000, are exempt during the life of such head of the family, and after his death inure to the benefit of his widow and children.

In Texas, under the constitution, the exempted homestead, not in a town or city, does not exceed 200 acres, to be selected by the owner in one or more parcels. In a town or a city it may consist in a lot or lots, not exceeding \$5,000 in value, aside from improvements.

In Vermont the homestead of a housekeeper or head of a family, consisting of a dwelling house, outbuilding, and the land used in connection therewith, not exceeding \$500 in value, and used by such housekeeper or head of a family as such is exempt from attachment or execution except for debts existing before the acquisition of the homestead and for taxes assessed thereon.

In Washington there is exempt from execution or attachment to every householder being the head of a family a homestead not exceeding \$1,000 in value, while occupied as such by the owner with his or her family. It may consist of a lot or lots in a city, or of a farm of any number of acres, so it does not exceed the value named.

In West Virginia, under the constitution, any husband or parent residing in the state, or infant children of dead parents, may hold a homestead of the value of \$1,000 exempt from forced sale (except as to debts contracted before 1872). It is to be set apart by the husband or parent by a written statement put on record, and is then free from all subsequent debts, except for the purchase money or for the erection of the improvements.

In Wisconsin, the homestead, when not in a city or village, does not exceed 40 acres; when in it, not one-fourth of an acre, together with the dwelling house thereon owned and occupied by a resident of the

state. It is to be set apart in compact form, but nothing is said as to value. It is liable for its own taxes, and for laborers' and mechanics' liens and the purchase money.

In Wyoming every householder being the head of a family is entitled to a homestead, not exceeding \$1,500 in value, free from any contract or civil obligation, only where occupied by such owner or person entitled, or his or her family. It may consist of a lot or lots in a town or city, or of a farm not exceeding 160 acres in contents.

In Arizona the head of a family may hold free from execution or forced sale "real property," to be selected by him, or her, not exceeding \$4,000 in value.

In New Mexico, to husband and wife, or to a widow or widower living with an unmarried daughter or minor son, there is exempt a homestead not exceeding \$1,000 in value.

In Utah the head of a family is allowed a homestead, to be selected, of the value of \$1,000 for himself, \$500 for his wife, and \$250 for every other member of his family. There is also exempt the cabin of a miner (irrespective of family), not exceeding \$500 in value.¹⁷⁶

We have, in the above, classed Georgia among the states having a homestead exemption, as it is so called in its laws, and in the decisions of the courts, though part of the property allowed to the debtor may be made up of personality, diminishing that of the land which he may retain to the same extent.

¹⁷⁶ Alabama, Const. art. 10, § 2; Arkansas, Const. art. 9, §§ 6, 10; Mansf. Dig. St. § 2994; California, Civ. Code, § 1237; Colorado, § 1631; Connecticut, §§ 2783, 2784; Florida, Rev. St. § 1998; Georgia, Const. art. 9, § 1; Idaho Territory, St. §§ 3035-3086; Illinois, c. 52, § 1, etc.; Iowa, St. §§ 1985-1997; Kansas, Const. par. 235; Kentucky, St. 1894, §§ 1702, 1709; Massachusetts, Pub. St. C. 123, § 1; Michigan, St. § 7721; Minnesota, c. 68; Mississippi, Code, § 1970 (also, Const.); Missouri, § 5435; Montana, Code Civ. Proc. § 322; Nebraska, §§ 5055-5067; Nevada, §§ 539-547; New Hampshire, c. 138, §§ 1, 2; New Jersey, "Sale of Land," §§ 53-59; New York, Code Civ. Proc. §§ 1397, 1398; North Carolina, Const. art. 10, § 2; Code, §§ 501, 509; Dakota, Ter. Pol. Code, c. 38; Ohio, Rev. St. § 5435; South Carolina, § 1994; Tennessee, Code, § 2935, and Const. art. 11, § 11; Texas, art. 2396, and Const. art. 16, § 50; Vermont, R. L. §§ 1894-1901; Washington, Code Proc. § 481; West Virginia, Const. art. 6, § 48; Code, c. 41, §§ 30-34; Wisconsin, St. § 2983; Wyoming, Rev. St. § 2780; Arizona, Ter. St. § 2071.

But the exemption laws of Pennsylvania, Virginia, and Indiana are drawn differently. In Pennsylvania the debtor may (aside from all wearing apparel, Bibles, and school books) claim \$300 in real or personal property. In Virginia, aside from enumerated articles, of his church pew, and burial lot, a householder has real and personal property to the amount of \$2,000 free from debt; but there are a number of privileged debts, against which the exemption does not prevail, and it can, moreover, be waived beforehand in any written contract. In Indiana, real or personal property of a resident householder to the amount of \$600 is "not liable to sale on execution," etc.; it is to be selected by disinterested appraisers.¹⁷⁷

In Maine, Rhode Island, Delaware, Maryland, the District of Columbia, and Oregon no part of the debtor's land or chattels real is exempted from execution.

It will be noticed that the upper limit in value among the homestead laws varies from \$5,000 in Texas and Idaho to \$500 in New Hampshire, while Iowa and some other states set no limit on value; that the limit for out of town lands comes down from 200 acres in Texas to 40 acres in Michigan, and for town lots from 1 acre in many of the states to 18 square rods in the large cities of Missouri.

Many of the states set no limits on the quantity of the land, and are therefore under no necessity of distinguishing between city and country. Such is the law of Massachusetts, Connecticut, Vermont, New Hampshire, New York, New Jersey, Kentucky, and seemingly the simplest and most just.

But the most important distinctions which will still have to be considered are the two requisites, called for by some states, but not by others: That the homestead be declared by some matter of public record, before the creditor gains his lien on the land; that the homestead must be in good faith occupied as a home by the debtor or his family.

The value is generally ascertained after a levy, when the homestead is claimed by the debtor; but it has been said in Michigan

¹⁷⁷ Pennsylvania, Purd. Dig. "Execution," 23, 24; Virginia, Code, § 3630; Indiana, Rev. St. §§ 703-705. The Virginia Code, after the section which, in accordance with the state constitution, names the limits of the exemptions, points out how the real estate may be selected. Such real estate is in practice nearly always the debtor's homestead, and is spoken of as such, though not in the statute, yet in all the judicial opinions.

that if the homestead is not worth more than the maximum at the time when the creditor's lien attaches, a subsequent rise in value will not aid the creditor.¹⁷⁸

Generally speaking, the amount of the exemption is governed by the law in force at the time when the debt was first contracted; and, when the homestead right is enlarged, the wider exemption applies only to contracts entered into thereafter. Such has been in most cases the very wording of the statute. In fact, when Georgia, under the reconstruction laws, proposed to come in with a retroactive homestead clause in her constitution, the congress insisted upon its being so modified as to affect subsequent indebtedness only.¹⁷⁹ By the great weight of authority, a retrospective homestead law cannot be made to operate on a prior contract without breaking in upon the federal guaranty against state laws impairing the obligation of contracts. In fact, the decisions of the supreme court of the United States make this view conclusive.¹⁸⁰ But if, at the time of contracting the debt, the homestead right existed, and the law granting it was afterwards repealed, and then re-enacted, the debtor is entitled to its benefit.¹⁸¹

Wherever land or other property is exempt from compulsory process for the collection of debts, it follows that a gift or other disposition which the debtor may make thereof cannot operate as a fraud upon his creditors.¹⁸² And in those states in which the

¹⁷⁸ Mills v. Hobbs, 76 Mich. 122, 42 N. W. 1084.

¹⁷⁹ Trimmer v. Winsmith, 41 S. C. 109, 19 S. E. 283.

¹⁸⁰ Cooley, *Const. Lim.* (6th Ed. p. 348) concedes the right of the states to enlarge the usual exemption of farming implements, tools, and household goods as against existing contracts, but a homestead exemption law, where none existed before, cannot be applied to contracts entered into before its enactment; citing Gunn v. Barry, 15 Wall. 610; Edwards v. Kearney, 96 U. S. 596. Contra, as to actions for prior torts, citing Parker v. Savage, 6 Lea, 406; McAfee v. Covington, 71 Ga. 272. And he shows that increased exemptions cannot be made to apply to old contracts. Johnson v. Fletcher, 54 Miss. 628; Wilson v. Brown, 58 Ala. 62; Duncan v. Barnett, 11 S. C. 333; Harris v. Austell, 2 Baxt. (Tenn.) 148; Wright v. Straub, 64 Tex. 64; Cochran v. Miller, 74 Ala. 50. (The distinction taken in certain North Carolina cases, as to whether the lien of the judgment had already attached, thus becomes immaterial.)

¹⁸¹ Murray v. Trumbull (N. H.) 29 Atl. 461.

¹⁸² Dowd v. Hurley, 78 Ky. 260; Pollock v. McNeil (Ala.) 13 South. 937; Shipe v. Repass, 28 Grat. 734; Hatcher v. Crews' Adm'r, 83 Va. 371, 5 S. E. 221.

law forbids preferences among creditors the words or the evident meaning of the statute reach only those conveyances or mortgages which prefer one creditor to the exclusion of another; and they cannot therefore affect a sale or pledge of the homestead (or, if an interest of limited value only is exempted, of the homestead right), for the exclusive benefit of one or more creditors; for the others cannot be said to be excluded, when the debtor disposes of something which they could not have reached.¹⁸³

As to the quality of the estate, it may be broadly stated that the exempted land need not be held in fee simple. Indeed, it would be cruel to take from the debtor a smaller estate, when he might hold the greater; and a life estate or leasehold in the homestead of limited value and area is undoubtedly as free from levy as the fee. And where, as in Virginia and Georgia, land is exempted only by value, without regard to its fitness for occupation as a home, and in one mass with as much personalty as will help to make up the limit in value, it seems to follow, naturally, that the lesser estate should be appraised only according to what such lesser estate is worth, not according to what the land is worth in fee.¹⁸⁴

A greater difficulty has arisen over undivided shares in land,—not, of course, in Virginia or Georgia, or in Pennsylvania and Indiana, which speak only of “real estate,”—but in those states in which the homestead, such as is occupied by the debtor or such as he is to define by metes and bounds, and “select” by a public act, is alone exempt. It often happens that one of several children and coheirs, owning only one-half, or still smaller undivided share in the father’s homestead, lives upon it, with the assent of his brothers and sisters. His creditors could, at best, sell only his share;

So, where the judgment is docketed before a sale of the homestead, the buyer may claim it thereafter. *Gardner v. Batts*, 114 N. C. 496, 19 S. E. 794. Where a conveyance of the homestead is set aside, the right reattaches. *McFarland v. Goodman*, 6 Biss. 111, Fed. Cas. No. 8,789; *Marshall v. Sears’ Ex’r*, 79 Va. 49; *Hatcher v. Crews*, 83 Va. 271, 5 S. E. 221. Contra, *Kirk v. Cassady* (Ky.) 12 S. W. 1039. And see the very peculiar case of *Johnston v. McPherran*, 81 Iowa, 230, 47 N. W. 60.

¹⁸³ *Lishy v. Perry*, 6 Bush, 515; *Baker v. Kinnaird*, 94 Ky. 5, 21 S. W. 237.

¹⁸⁴ *Phillips v. Warner* (Tex. App.) 16 S. W. 423; *Kuttner v. Haines*, 135 Ill. 382, 25 N. E. 752 (leasehold); *Franks v. Lucas*, 14 Bush, 395 (the syllabus says a life estate can be claimed in more land than what would be worth \$1,000).

and they will generally lose less by the exemption than if he owned the whole. Where occupancy is not required, there is even less reason for distinguishing against the part owner. But the decisions of the states are not in harmony.¹⁸⁵ Where land belongs to a partnership, for partnership purposes, the individual members have no interest except in the surplus after the creditors are paid; and there can be no homestead or other exemption. But it has been held differently where the partners jointly own, occupy, and till a farm.¹⁸⁶

The homestead may not only be abandoned, but it may, either in whole or in part, lose its character, by bodily or juridical changes. The buildings lose it if removed from the home place and put upon the lands of another; the proceeds (if they otherwise might remain exempt), by being removed from the state and invested in land elsewhere.¹⁸⁷ The words "to be selected by the" debtor, or words of similar import, are found in many of the homestead acts; but they must be closely scanned in their surroundings, to find their object and meaning. We have seen that in New Jersey the object of the "declaration" is to cut off all credit which the debtor might gain by the ownership of the homestead, and that the mode of publishing this declaration is made so onerous that the law is a dead letter. But there are other states in which the character of the homestead must be placed on the public records before any lien is gained by the creditor. It is clearly so in Connecticut, Massachusetts, and

¹⁸⁵ Oswald v. McCauley, 6 Dak. 289, 42 N. W. 769 (cotenant).

¹⁸⁶ In Kentucky, where husband and wife own by halves, the husband can have enough laid off to make his own interest worth \$1,000. Johnson v. Kessler, 87 Ky. 458, 9 S. W. 394; Lindley v. Davis, 7 Mont. 206, 14 Pac. 717 (tenant in common has his homestead right); Ferguson v. Speith, 13 Mont. 487, 34 Pac. 1020 (each partner is entitled to his full exemption from the firm property). So, in Nebraska, it is held that the value applies to the debtor's interest in the homestead, not to the value of the whole. Hoy v. Anderson, 39 Neb. 388, 390, 58 N. W. 125. In Wisconsin, where land belongs to a partnership, the partners may, even after a levy, divide their interests, and each claim his exemption. Russell v. Lennon, 39 Wis. 570. The occupant, owning a part of a three-fourths interest, was allowed his exemption in Kaser v. Haas, 27 Minn. 406, 7 N. W. 824. See contra, as to "business homestead," Van Slyke v. Barrett (Tex. Sup.) 16 S. W. 902.

¹⁸⁷ Fordyce v. Hicks, 80 Iowa, 272, 45 N. W. 750 (relying, among other cases, on Dyer v. Clark, 5 Metc. [Mass.] 562); Curtis v. Des Jardins, 55 Ark. 126, 17 S. W. 709; Dalton v. Webb, 83 Iowa, 478, 50 N. W. 58.

New York, and in West Virginia, where the entry of record shields the land only from debts subsequently contracted.¹⁸⁸ In Idaho, the declaration must at all events precede the attachment or judgment by which a lien is gained.¹⁸⁹ In Colorado, Texas, and some other states the declaration may be put on record after the judgment becomes a lien, if it is done before an execution is levied on the very tract to be protected.¹⁹⁰ In California, the declaration must be filed (husband and wife must join, when homestead is selected from her separate property) before a judgment becomes a lien; but if the owner does his duty in the matter, any errors of the recording officer cannot defeat his purpose.¹⁹¹ Even in states in which no previous declaration, or setting apart, is demanded, where the law allows the right to be set up after the levy is made, yet some sort of claim must be made by the owner, or he may be concluded by a sale. This is especially true in Virginia, where land is sold for debt only by decree in equity.¹⁹² The owner, whether in his declaration, as required by the laws of some states, or by his claim after levy, may conclude himself by asking less than he is entitled to; and his homestead right in the omitted part is then gone.¹⁹³ But, where the homestead is not set up at all in the prescribed form, even after

¹⁸⁸ Connecticut, Gen. St. §§ 2783, 2784; New York, Code Civ. Proc. §§ 1397, 1398.

¹⁸⁹ Wright v. Westheimer, 2 Idaho, 962, 28 Pac. 430 (a hard case, as the home place in question had been bought with the proceeds of sale of a former homestead).

¹⁹⁰ Ingle v. Lea, 70 Tex. 609, 8 S. W. 325. No declaration needed (in Texas) unless the homestead is a part of a tract greater than 200 acres. Coates v. Caldwell, 71 Tex. 19, 8 S. W. 922; Weare v. Johnson (Colo. Sup.) 38 Pac. 374; Woodward v. People's Nat. Bank, 2 Colo. App. 369, 31 Pac. 184. The selection from larger tract does not apply to city lots. Pellat v. Decker, 72 Tex. 578, 10 S. W. 696.

¹⁹¹ California, Civ. Code, § 1241. As to requisites under this section, see Southwick v. Davis, 78 Cal. 504, 21 Pac. 121; Farley v. Hopkins, 79 Cal. 203, 21 Pac. 737. As to sufficiency of description, see Schuyler v. Broughton, 76 Cal. 524, 18 Pac. 436; Quackenbush v. Reed, 102 Cal. 493, 37 Pac. 755 (clerk's neglect harmless).

¹⁹² Wray v. Davenport, 79 Va. 19. The homestead should be set apart by commissioners, not by the jury trying an ejectment between the execution purchaser and former owner. Lazar v. Caston, 67 Miss. 275, 7 South. 321.

¹⁹³ Schuer v. King, 100 Ala. 238, 13 South. 912 (claim entered after levy); Motley v. Jones, 98 Ala. 443, 13 South. 782. A selection is necessary in this

levy (which may happen because the execution defendant is unable or unwilling to pay the cost of appraisement), yet it is the law in some of the states that the sheriff cannot go on with his levy and sale if he learns, from any source, that the tract levied upon is the debtor's homestead.¹⁹⁴

Much difficulty has been found in Kentucky in determining when the debtor, by nonclaim of his homestead, has lost his right, and this even where the proceedings were by creditors' bill, and the sale under the judgment of the court. The statute allows the homestead to be laid off, after judgment and before sale. Thus, the judgment to sell, unless this very matter is litigated, concludes nothing. When the proceeding is upon a mortgage, the wife can only be concluded if made a party. Yet, in some cases (which it is hard to reconcile), the loss of the homestead was treated as res judicata, while, in others, repeated orders seemed to be unavailing to secure the creditor in the fruits of the sale. The reader must harmonize the decisions as best he can.¹⁹⁵ In Georgia, a designation of the exempted lands by the owner is not enough, but it must be approved by the ordinary or probate judge. His jurisdiction arises only when the head of a family applies to have a homestead laid off. Should the applicant not at the time when he applies to the ordinary, have the qualification, the order of the judge allowing the homestead designation is void,—and does not gain any force

state only where the actual homestead is a part of a tract larger than the maximum. *Pollak v. McNeil*, 100 Ala. 203, 13 South. 937.

¹⁹⁴ *King v. McCarley*, 32 S. C. 264, 10 S. E. 1075. See, also, *Quigley v. McEvony*, 41 Neb. 73, 59 N. W. 767. In North Carolina the sale of the homestead is void, though it have never been laid off. *McCracken v. Adler*, 98 N. C. 400, 4 S. E. 138. So in South Carolina, though the land occupied by the debtor is still held in common. *Mellichamp v. Mellichamp*, 28 S. C. 125, 5 S. E. 338; *National Bank of Newberry v. Kinard*, 28 S. C. 101, 5 S. E. 464. In Michigan occupancy is in itself notice of selection. *Riggs v. Sterling*, 60 Mich. 643, 27 N. W. 705.

¹⁹⁵ First judgment held binding, *Harpending's Ex'r's v. Wylie*, 13 Bush, 158; *Derr v. Wilson*, 84 Ky. 14; *Snapp v. Snapp*, 87 Ky. 554, 9 S. W. 705; *Hill v. Lancaster*, 88 Ky. 338, 11 S. W. 74. Not binding, *Wing v. Hayden*, 10 Bush, 276; *Crout v. Sauter*, 13 Bush, 442. In *Gideon v. Struve*, 78 Ky. 134, it was held that, when a conveyance by husband and wife is adjudged fraudulent, and the land ordered to be sold, it concludes them against thereafter claiming the homestead.

by the homesteader's marrying thereafter, and before the levy of an execution.¹⁹⁶

Where the statute allows only one tract to constitute the homestead, a question may arise on account of a road or street dividing the tract. This would seem to be of little import in the country (as a farm is often cut in two by a road, or even by a railroad), but is inadmissible in a city or town, as a lot lying on both sides of a street is unheard of.¹⁹⁷ A question may also arise where a man owns a town lot and a farm or farms in the neighborhood. It must be decided as one of fact,—has the debtor his true dwelling in the town or on the farm; and, according to the true answer, he may claim his urban, or his country, homestead.¹⁹⁸ An hotel, though the debtor eats and sleeps in it, while managing it, cannot be called his homestead; but it is hard to draw the line when the house is small and when the debtor lives in it with his family, occupying a considerable portion of the house.¹⁹⁹

Occupancy and residence, though implied in the word "homestead," is not required by all the homestead laws. Thus the constitution of South Carolina now in force (May, 1895) exempts "a homestead in land" (not "his homestead") and has been construed as rendering occupancy wholly needless.²⁰⁰ Where residence is required, it is often difficult to draw the line. Thus, where the debtor owns a lot with two adjoining houses, divided by a fence, and lives in one, the other would not seem a part of the homestead, but might be, if used during part of the year. A tract, adjoining the home farm, not used further than by fetching water from a spring upon it, is not occupied with it.²⁰¹

¹⁹⁶ Walker v. Thomason, 77 Ga. 682.

¹⁹⁷ Griswold v. Huffaker, 47 Kan. 692, 28 Pac. 696, where the distinction is put on the ground that the country road is but an easement, while in Kansas the fee of town streets is in the county, referring to Randal v. Elder, 12 Kan. 257. In North Carolina the statute expressly allows several tracts, and plainly so in Georgia and Alabama.

¹⁹⁸ Pridgen v. Warn, 79 Tex. 588, 15 S. W. 559.

¹⁹⁹ Laughlin v. Wright, 63 Cal. 113; In re McDowell's Estate, 103 Cal. 264, 35 Pac. 1031.

²⁰⁰ Nance v. Hill, 26 S. C. 227, 1 S. E. 897.

²⁰¹ Colbert v. Henley, 64 Miss. 374, 1 South. 631; Nix v. Mayer (Tex. Sup.) 2 S. W. 819; Hawley v. Simons (Ill. Sup.) 14 N. E. 7 (defendant's living on his tract, adjoining his wife's farm, not residence on the latter).

A mere intention to occupy the tract is not the same as residence;²⁰² but preparations in good faith have been deemed as equal to it,—for instance, where a lot was graded and fenced in as the first step to the building of a dwelling house upon it.²⁰³ Occupancy at the time when the judicial lien attaches, in Texas when the execution is levied (and so in all states that have no judgment lien), is sufficient; but to move a house upon the tract after it has been levied upon, and thus to attempt its conversion into a homestead, is unavailing.²⁰⁴

As to the effect of the homestead right on the judgment lien, two theories prevail, each having taken hold of some of the states,—either that the lien does not attach at all to property exempt by law; or that it is only suspended, and attaches itself to the land, when, by the abandonment of the homestead, by the death of the debtor, and of his dependents, or any other means, the homestead exemption has come to an end. Under the former view, intervening conveyances, incumbrances, or even later judgments and executions, would obtain the preference; and this, indeed, seems to be the predominating doctrine.²⁰⁵

Besides the state exemption laws, there is now another law, of very wide application, under which many highly valuable tracts are freed in great measure from compulsory sale for debt. It is the act of congress of 1862, granting homesteads to actual settlers, to which reference has been made in a former chapter. Congress has, under the power conferred upon it to dispose of the territory and other property of the United States, shielded the lands earned by settlement under the homestead law from sale for any

²⁰² Keyes v. Bump's Adm'r, 59 Vt. 391, 9 Atl. 598; Archibald v. Jacobs, 69 Tex. 248, 6 S. W. 177 (occupant of one farm cannot claim another because of his intentions).

²⁰³ Deville v. Widoe, 64 Mich. 593, 31 N. W. 533; Parr v. Newby, 73 Tex. 468, 11 S. W. 490 (intent with certain acts).

²⁰⁴ Ingle v. Lea, 70 Tex. 609, 8 S. W. 325. Secus, Bowler v. Hoard, 71 Mich. 150, 39 N. W. 24; Riggs v. Stirling, 60 Mich. 643, 27 N. W. 705 (occupancy is, in Michigan, the best notice of selection).

²⁰⁵ In South Carolina (Code Civ. Proc. § 310) the former position is expressly laid down, and this section is held constitutional as not unduly extending the organic exemption law in Ketchin v. McCurley, 23 S. C. 1, 11 S. E. 1099. In Virginia the lien revives when the exemption comes to an end. Blose v. Bear, 87 Va. 177, 12 S. E. 294.

debt contracted by the homesteader before the issual of the patent; and it remains secure against those debts, without any need for further occupancy by the grantee.²⁰⁶

§ 170. Who Entitled to the Homestead, and against Whom.

I. The first requisite everywhere is that the debtor should be a resident; for, unless he is such, the land within the state, upon which the courts have to act, cannot be his home. A change of residence is in itself an abandonment of such homestead right as the debtor may have had.²⁰⁷ And "residence" has been taken in a somewhat narrower sense than "domicile." While a debtor going into another state on business alone would not forfeit his homestead, yet, when he takes his family with him, and makes his home there, a mere intention to return at some later period would not save the old homestead from levy.²⁰⁸

By the laws of Virginia, Indiana, and Pennsylvania the exempted property which the debtor may take in land is not called a homestead in the statute; but land which the debtor, in the manner pointed out by law, designates as exempt is continually spoken of as his "homestead" in the Virginia Reports.²⁰⁹ Whether an unmarried man with a family can have his exemptions set out is left in some doubt. We have seen that in Alabama, Arkansas, California, Connecticut, Michigan, Minnesota, Montana, Nevada, New Hampshire, North Carolina, Texas, and Wisconsin the law gives the homestead right to "the owner," or to "any person," without requiring that he be a householder, or the head of a family depending upon him; and in Idaho a smaller exemption is given to everybody without such a qualification.²¹⁰

²⁰⁶ Gile v. Hallock, 33 Wis. 523 (affirming the congressional power), followed in its reasoning in Adams v. White, 23 Fla. 352, 2 South. 774.

²⁰⁷ Lindsay v. Murphy, 76 Va. 428 (householder who has removed from state not entitled). Somewhat irregular is Stanton v. Hitchcock, 64 Mich. 316, 31 N. W. 395, where the owner's widow, coming into the state after his death, was allowed to claim his homestead.

²⁰⁸ Fulton v. Roberts, 113 N. C. 421, 18 S. E. 510.

²⁰⁹ Calhoun v. Williams, 32 Grat. (Va.) 18.

²¹⁰ See references to statutes in note 176 of section 169.

Other states have either confined the homestead right to the "head of a family," or "householder with a family," or have undertaken in the statute to define the family, or to point out who, as having the care for and maintenance of others, is to be deemed a head of a family, and therefore entitled to hold his home free from debt. Now, in the absence of a statutory definition, the man having his wife or his minor children living with him would alone be considered the head of a family.²¹¹ However, none of the statutes is so drawn as to take from the wife and mother, upon a judgment against her, the homestead owned by her, when she is really the head of the family, as she is when the husband has neither property nor the ability of earning a livelihood;²¹² and, generally, she enjoys the same exemption when she owns the homestead, as he would enjoy if it were his.²¹³ Unless the words of the statute are very restrictive, a debtor who has a sister, or minor brother, or a grandchild dependent upon and living with him or her at the homestead, is entitled to the exemption as a "householder," or as head of the family.²¹⁴ The debtor must

²¹¹ *Bosquett v. Hall*, 90 Ky. 566, 13 S. W. 244 (infant children not of the owner's blood not a family); *Ellis v. Davis*, 90 Ky. 183, 14 S. W. 74 (widower with housekeeper is not "with a family"). Compare *Seaton v. Marshall*, 6 Bush (Ky.) 429, as to a householder with a family under another exemption law. A temporary separation between husband and wife does not destroy the family. *Carrington v. Herrin*, 4 Bush (Ky.) 624.

²¹² *Johnson v. Little*, 90 Ga. 781, 17 S. E. 294 (though the wife is, even then, not the head of the family, she has the right through her care of minor daughters); a fortiori, a widow with dependent children, *Coughanour v. Hoffman's Estate*, 2 Idaho, 267, 13 Pac. 231; even a widow, whose son with wife and infant children live with her, *Riley v. Smith* (Ky.) 5 S. W. 869.

²¹³ Thus California, Civ. Code, § 1238, begins "when the claimant is married," and throughout this and following sections refers as well to married women as to married men. The right of the wife may be limited by the requirement of the claimant being the head of a family, *Neal v. Sawyer*, 62 Ga. 352; but where the husband is physically unable to work for wife and children, she may be the head of the family and claim a homestead in her own land, *Johnson v. Little*, 90 Ga. 781, 17 S. E. 294.

²¹⁴ *Moyer v. Drummond*, 32 S. C. 165, 10 S. E. 952 (man supporting sister); *Chamberlain v. Brown*, 33 S. C. 597, 11 S. E. 439. See the great extension in California, by act of March 9, 1893, which aims to take in almost every possible case of dependent kinsfolk, from grandfather-in-law to nephews and nieces. *Lane v. Phillips*, 69 Tex. 240, 6 S. W. 610 (father with illegitimate children is head of family).

have the character of head of a family before the lien attaches upon the homestead or otherwise exempted land.²¹⁵

Grave questions have arisen where the debtor, having, while in debt, been the head of a family, or "a householder with a family," or within definitions of similar import, loses this character, as he may in many different ways. The wife or children may die, or the wife may desert him and the children come of age and establish their own homes. It would seem natural that the debtor should lose the right to exemptions which are grounded upon the dependence of others upon his care, but most of the decisions have gone the other way.²¹⁶ In the states in which the homestead implies residence or occupancy, it may be abandoned by permanent removal, as has been shown in another chapter, in the section on "Conveyance of the Homestead." We have seen how the husband's homestead generally devolves on the widow, or on her and the minor children, upon his death; and she will hold it against his creditors without actual occupancy, but against her own creditors she must fulfill the same conditions of residence or occupancy, to save her life estate, as she would had the land been originally her own.²¹⁷ Whenever the sur-

²¹⁵ Kennerly v. Swartz, 83 Va. 704, 3 S. E. 348.

²¹⁶ A "householder" has been defined, in cases not bearing on the homestead, as nearly equivalent to "head of a family." Thus, on a question of jury duty, it was held in Aaron v. State, 37 Ala. 109, that a single man renting a sleeping apartment of which he has sole control is not a householder, and see other cases there quoted. But it was held in Wilkinson v. Merrill, 87 Va. 513, 12 S. E. 1015, that a debtor living in his home with a grandson nine years old did not lose his homestead right by the death of the child. It was a fearful atrocity, the child being almost, if not actually, murdered by a creditor, in order to put an end to the "householding," and thus to the exemption. In Zapp v. Strohmeyer, 75 Tex. 638, 13 S. W. 9, the husband owning the homestead was divorced, and while the decree said nothing as to custody of the children, they lived for the time being with the mother; homestead maintained. Stultz v. Sale, 92 Ky. 5, 17 S. W. 148 (right once acquired not lost by death or marriage of children); Gates v. Steele, 48 Ark. 539, 4 S. W. 53 (husband is "head of family," though he has no children and the wife has deserted him); Bank v. Shelton, 87 Tenn. 393, 11 S. W. 95 (homestead not lost by death of wife, though attachment levied after her death). In Arp v. Jacobs, 3 Wyo. 489, 27 Pac. 800, wife and children left the hus-

²¹⁷ Gowan v. Fountain, 50 Minn. 264, 52 N. W. 862. And see Edwards v. Reid, 39 Neb. 651, 58 N. W. 202.

viving spouse by misconduct loses the homestead right as against the decedent's heirs, she will also lose it as against his creditors.²¹⁸

II. As to the debts against which the exemption can be set up, the burden is on the creditor to show that the debt is privileged. We have already stated that debts contracted before the enactment of the exemption law are privileged on constitutional grounds. The other privileged debts are usually of two classes, the first of which in a great measure embraces the other.

This first class is of debts contracted before the homestead was acquired, or before the lot or tract was rendered habitable by putting a homestead upon it. For this the underlying reason is that, where credit is given upon the faith of the debtor's means, which are at the time liable to his debts, he should not be permitted to withdraw them from the reach of liabilities thus contracted by turning them into exempt property.²¹⁹ In Michigan, Wisconsin, and several other states debts created before the purchase of the homestead are not privileged against the homestead. An attempt has been made to treat the purchase as a fraud, in the same light as a transfer of the debtor's lands liable to his debts to the wife or children for his benefit. And where the debt had been contracted with the pre-determined purpose of thus putting the assets arising from the contract into this unassailable shape, the homestead was subjected; but the courts would not, as a general proposition, give to the antecedent creditor the privilege of overriding the homestead right.²²⁰

The other privileged debt (and this is recognized everywhere) is

band. A divorce followed. He still occupied the homestead, and held his right.

²¹⁸ Cockrell v. Curtis, 83 Tex. 105, 18 S. W. 436. The widow's right is not lost by a second marriage. Fore v. Fore, 2 N. D. 260, 50 N. W. 712.

²¹⁹ Hence, in Kentucky, only a homestead bought and paid for (and only as far as paid for) is liable to antecedent debts,—not one obtained by gift, devise, or descent. Thompson v. Heffner, 11 Bush, 364; Moseley v. Bevins, 91 Ky. 264, 15 S. W. 527; Morehead v. Morehead (Ky.) 25 S. W. 750.

²²⁰ Pratt v. Burr, 5 Biss. 36, Fed. Cas. No. 11,372. Contra, Meigs v. Dibble, 73 Mich. 101, 40 N. W. 935. But a homestead which has been bought with trust funds diverted to that end may be subjected to the trust. Pierce v. Holzer, 65 Mich. 263, 32 N. W. 431. In Colorado, the homestead may be acquired, even after judgment, if only the note of record is made before execution. Woodward v. People's Nat. Bank, 2 Colo. App. 369, 31 Pac. 184.

one incurred for the purchase of the homestead, or for the erection, enlargement, or repairs of the buildings upon it; and this, generally, without regard to any vendor's or mechanic's lien which the creditor may have upon the homestead, though in some states the existence of such a lien alone overrides the homestead,²²¹ and in Michigan it cannot be imposed except by the written agreement of the owner.²²²

Coming back to antecedent debts, a bond, whether of principal or surety, counts from the time when it is executed, though the default may happen much later;²²³ and a renewal relates back to the time when the debt was first contracted.²²⁴ Costs have in some cases been considered as an incident to the debt; in other cases, not.²²⁵ But where the debt is contracted after the purchase of the homestead it is not privileged, because the place was not yet occupied by the debtor.²²⁶ Where the place has not yet been fitted for a homestead by the erection thereon of a dwelling house, the decisions are not quite in harmony whether an antecedent debt can be

²²¹ Where the mechanic's lien law holds the landowner liable, from grounds of public policy, to a subcontractor or material man, the homestead is not bound, being protected by the constitution. *Meyer v. Berlandi*, 39 Minn. 438, 40 N. W. 513; *Walsh v. McMenomy*, 74 Cal. 356, 16 Pac. 17 (moreover the act then in force left material men out).

²²² *Mills v. Hobbs*, 76 Mich. 122, 42 N. W. 1084 (and builders not aided by not knowing that the owner intended the place for her homestead).

²²³ *Berry v. Ewing*, 91 Mo. 395, 3 S. W. 877; *Cabell v. Given*, 30 W. Va. 760, 5 S. E. 442.

²²⁴ To establish time rank of debt, the rules of application of payments are followed. *Sternberger v. Gowdy*, 93 Ky. 146, 19 S. W. 186. In all these cases, the burden is on the execution buyer. *Anthony v. Rice*, 110 Mo. 223, 19 S. W. 423; *Travis v. Davis' Ex'r (Ky.)* 15 S. W. 525; *Marsh v. Alford*, 5 Bush, 392; and other cases in Kentucky. See, for peculiar facts, making the debt a new one, *Hale v. Richards*, 80 Iowa, 164, 45 N. W. 734. Same privilege to assignee of old note taking a new security (*Bradley v. Curtis*, 79 Ky. 327); or a third person who advances money to take up a debt (*Dudley v. Goddard [Ky.]* 12 S. W. 382). In *Tohermes v. Beiser*, 93 Ky. 415, 20 S. W. 379, the debtor was not allowed to transfer his homestead right, after debt contracted, from one house to another.

²²⁵ In *Bank v. Goodman*, 33 S. C. 601, 11 S. E. 785, the costs on a note given before the constitution were held inferior to the homestead right. *Knight v. Whitman*, 6 Bush, 51, such costs were preferred along with the demand; s. p., *Long v. Walker*, 105 N. C. 90, 10 S. E. 858.

²²⁶ *Hensey v. Hensey's Adm'r*, 92 Ky. 164, 17 S. W. 333.

cut off under a law which exempts only a real homestead.²²⁷ The debtor may sell his homestead, and with the funds arising from the sale buy or build another, and the latter is exempt from debts contracted while he owned the former.²²⁸

Coming to the purchase money for the homestead, it is plain that a renewal note is privileged as much as the security originally given, and the privilege has been extended even to one who has advanced money expressly to pay off the debt for the price of the land.²²⁹ Where the debt is for part of the purchase money of the whole tract, the whole tract is subject to sale; but where it represents a part of the homestead only, that part alone is liable.²³⁰

The contract for building or putting machinery upon the homestead which will bind it may be made by the owner without the co-operation of his wife, and the lien will attach. The machinery must be such as becomes a part of the freehold.²³¹ Under the constitution of Georgia the homestead is liable only "for labor done thereon," and this is construed as meaning such tillage or improvements made after the land has been publicly declared the owner's homestead, and altogether some peculiar and rather surprising distinctions have been worked out from the clause containing these

²²⁷ See, in favor of the execution creditor, *Hansford v. Holdam*, 14 Bush, 210, *Fish v. Hunt*, 81 Ky. 584; against him, *Roberts v. Riggs*, 84 Ky. 251, 1 S. W. 431 (already a habitable house, when debt arose), *Morehead v. Morehead* (Ky.) 25 S. W. 750 (built, but not occupied when debt arose). In states other than Kentucky, the exception in favor of antecedent creditors is not nearly as broad. In Colorado, a homestead was held good against a debt incurred after the debtor had bought and designated it, but before he acquired the title. *Woodward v. People's Nat. Bank*, 2 Colo. App. 369, 31 Pac. 184.

²²⁸ *Lamb v. McConkey*, 76 Iowa, 47, 40 N. W. 77; *Cooper v. Arnett*, 95 Ky. 603, 26 S. W. 811.

²²⁹ *McElmurray v. Blue*, 91 Ga. 509, 18 S. E. 313. See, also, *Perdue v. Fraley*, 92 Ga. 780, 19 S. E. 40; *Moses v. Home Building & Loan Ass'n*, 100 Ala. 465, 14 South. 412; *Clitus v. Langford* (Tex. Civ. App.) 24 S. W. 325. Secus where the loan is not made expressly and with the knowledge of all parties for that purpose. *Dreese v. Myers*, 52 Kan. 126, 34 Pac. 349.

²³⁰ *Cook v. Cook*, 67 Ga. 381.

²³¹ *U. S. Inv. Co. v. Phelps & B. Windmill Co.*, 54 Kan. 144, 37 Pac. 982 (without wife's consent); *Phelps & B. Wind-Mill Co. v. Shay*, 32 Neb. 19, 48 N. W. 896. See, contra, *Sternberger v. Gowdy*, supra. It must not be assumed as certain that the courts of other states, under their particular statutes, will reach the same conclusion.

words.²³² In Virginia the following demands are privileged against the exemption of \$2,000 in land and personality: (1) For the purchase price; (2) for services of a laboring person or mechanic; (3) on liability of any public or court officer or fiduciary, or collection by an attorney; (4) for taxes or assessments; (5) for rent; (6) for fees of public or law officers; (7) demands as to which the exemption has been waived in the manner prescribed by law. An act of 1875 requires all sureties upon official bonds to waive the exemption. Several of these exceptions (especially the last) have been passed upon, and declared to be constitutional.²³³ Among the class of liabilities against which the homestead right can be set up there is also great variety of rulings, depending in part only on the wording of the constitution or statute; in many cases on the views of the judiciary. The constitutions of the Southern states protect the homestead against debt, and the same word has been used in statutes elsewhere; and a tort has been said not to raise a debt, though the liability for the tort must ripen into a judgment, which constitutes a debt, before it is enforced.²³⁴ It has been held in one state that the default of a tax collector in accounting for money in his hands is *ex delicto*, and therefore not a debt within the homestead clause of the constitution. In another state the homestead right was de-

²³² *Wilder v. Frederick*, 67 Ga. 669, which quotes earlier Georgia cases on all details of the question (*Dicken v. Thrasher*, 58 Ga. 360; *Willingham v. Maynard*, 59 Ga. 330; *Stokes v. Hatcher*, 60 Ga. 617; *Connally v. Hardwick*, 61 Ga. 501).

²³³ *Linkenhoker v. Detrick*, 81 Va. 44 (waiver law constitutional); *Com. v. Ford*, 29 Grat. 683 (waiver implied). Debts are not privileged on account of antedating the acquisition of the homestead; for there is really no homestead right, the debtor having the right to claim property of any other kind. Manner of waiving defined in *Scott v. Cheatham*, 78 Va. 82.

²³⁴ In Michigan the homestead is exempt from execution for tort. *Mertz v. Berry*, 101 Mich. 32, 59 N. W. 445. In Arkansas the constitution denies the homestead right to an attorney on a judgment for money collected. It was held in *Sanders v. Sanders*, 56 Ark. 585, 20 S. W. 517, that where an attorney obtains money to indemnify him against a suretyship for his client the debt is not privileged. The costs adjudged in a criminal case are not privileged. *Hollis v. State*, 59 Ark. 211, 27 S. W. 73. In Iowa the part of a homestead used as a saloon is liable under judgment for "civil injury." *Arnold v. Gotshall*, 71 Iowa, 572, 32 N. W. 508.

nied to a defaulter on what might be called sentimental grounds.²³⁵ It has been held repeatedly that the husband can hold his homestead right against process issued to enforce the wife's award of alimony, at least after her divorce. It might be different while she is still his wife, as the main object of the homestead right is the protection of wife and children.²³⁶

III. The debtor is given his homestead exemption mainly that he may be enabled to shelter those who are dependent upon him,—his wife and his minor children. When these are, by his death, deprived of his care, and of the fruits of his labor, they need the shelter of the homestead even more than during his lifetime. Hence the exemption does not cease with the death of the debtor owning the homestead. But the states greatly differ as to the time for which and the heirs or successors in whose favor the homestead remains free from the decedent's debts; or, as it is well put in the Alabama statute, "free from administration." We have shown in another chapter how, in many states, the surviving wife (or husband), or she and the minor children, have wider rights of inheritance in the homestead than in other land. Whenever such preference is given to them over other heirs, they have it, *a fortiori*, over the decedent's creditors.²³⁷

In Florida, and it seems also in Idaho, the homestead is free from the late owner's debts absolutely, and no matter to whom it may go by descent or devise.²³⁸

Next come the states in which the homestead remains exempt only when it falls upon the widow and children or descendants; but

²³⁵ Schuessler v. Dudley, 80 Ala. 547, 2 South. 526; Com. v. Cook, 8 Bush, 220.

²³⁶ Biffle v. Pullam, 114 Mo. 50, 21 S. W. 450.

²³⁷ This subject is not easily severed from the rights of the family, widow, and minor children, as against general heirs, treated in section 114, to which we refer particularly for the law of California, North Carolina, and Mississippi. We refer the reader also to section 110 ("Quarantine and Widow's Award"); for where the widow's award can be taken out of lands it is an exemption at least as effective as the homestead right, and more effective than the latter is in those states which limit it by time or by conditions of occupancy.

²³⁸ Florida, Rev. St. § 1998; McDougall v. Brokaw, 22 Fla. 98. See Idaho, St. § 3073.

then is exempt forever, without limit in time, and without the condition of occupancy. It is so in Vermont when the homestead descends to the widow and children; also in Texas, where the husband takes the same rights under his wife; so, also, in Kansas. In the Dakotas, also, it descends free from debt as long as there is either surviving husband or wife or issue to take it. In Nebraska the widow takes it wholly free from debt. In Washington it goes to widow or children, and is not assets.²³⁹ The same absolute exemption is given to the widow (or surviving husband) and minor children or the one or other of these, by the laws of Arkansas (unless the widow has a homestead of her own), in Colorado and Wyoming, and, it appears, in Montana.²⁴⁰ Much less favorable to the survivors is the law in other states which leave the homestead to the widow and minor children or to either of them, only until the widow's (or widower's) death, and until the children, or the youngest among them, comes of age. These states are Missouri (where the homestead may be sold for debt subject to the estate thus given to the widow and minor children²⁴¹); also Tennessee; Alabama, where other lands of like value may be set aside when there is no homestead; and New York, where, however, a married woman's homestead right does not survive to her husband.²⁴² In Wisconsin the homestead descends to the widow and minor child or children (or either) free from all debts; to adult children, or to descendants other than children, subject only to the debts contracted for the last sickness, and for funeral and administration expenses; to other heirs subject to all debts.²⁴³ In Georgia the exemption in the hands of the widow and minor children ceases not only when the latter come of age, but also when the former marries; while in Virginia

²³⁹ Vermont, R. L. § 1898; Texas, Rev. St. art. 2055; Kansas, Rev. St. 2593; Dakota Territory, Pol. Code, c. 38, §§ 16, 17; Nebraska, Consol. St. § 1124; Washington, 2 St. § 972. See *McMillan v. Mau*, 1 Wash. St. 26, 23 Pac. 441.

²⁴⁰ Arkansas, Sand. & H. Dig. (1894) §§ 3695, 3696. The character of homestead must be impressed on it during debtor's life. *Ward v. Mayfield*, 41 Ark. 94; Colorado, St. § 1634; Wyoming Territory, § 2782; Montana, Code Civ. Proc. § 327.

²⁴¹ Missouri, Rev. St. § 5430. See *Poland v. Vesper*, 67 Mo. 727.

²⁴² Tennessee, Code, § 2944; Alabama, Civ. Code, §§ 2543, 2544; New York, Code Civ. Proc. § 1400.

²⁴³ Wisconsin, Ann. St. § 2271.

not only the widow, but even a minor child, loses the exemption by marrying.²⁴⁴ In a number of other states there is a further, and, if it was literally enforced, a most weighty, restriction. The homestead is to be exempt in the hands of widow or minor children only as long as it is occupied by them. Such is the law in Connecticut (subject to right of occupation by widow and minor children); in Michigan; in Minnesota; in Massachusetts (if some of them occupies the same, and where the widow loses her right by remarriage); in New Hampshire; in South Carolina (while the children are living on the homestead); West Virginia (if held and enjoyed as a homestead); in Illinois (where, however, the duty to occupy seems to rest only on a surviving spouse, but not on minor children); in Iowa (continuing to occupy the homestead as such; children hardly considered); in Ohio, where the widow's or minor child's homestead right is lost by marriage, it is also restricted by the condition of residing thereon; and in Kentucky.²⁴⁵

This right of occupancy has been treated so liberally as to make it practically a life estate. Should the widow rent out the premises, and put her tenant in possession, it is not deemed an abandonment, though, if the debtor himself had done so, it would have been an abandonment.²⁴⁶ The widow cannot, by her desertion of the homestead, take the right of occupancy from her minor children. In the very nature of things, whenever the widow or minor children have the right against other heirs, they have it against the creditors of the husband and father.²⁴⁷

²⁴⁴ Georgia, Code, § 2024; Virginia, Code, § 3635; *Helm v. Helm*, 30 Grat. 404.

²⁴⁵ Connecticut, Gen. St. § 2783; Minnesota, c. 68, § 1; Michigan, How. Ann. St. § 7721 (see *Dei v. Habel*, 41 Mich. 88, 1 N. W. 964, as to limitation during widowhood, where the only child had died); Massachusetts, c. 123, § 8; New Hampshire, c. 138, § 2; South Carolina, Rev. St. 1893, § 2129; West Virginia, c. 41, § 34; Illinois, c. 52, § 2; Iowa, § 1989; Ohio, § 5437; Kentucky, Gen. St. c. 38, §§ 13, 14 (St. 1894, §§ 1706, 1707).

²⁴⁶ See *Phipps v. Acton*, 12 Bush, 375; *Sansberry v. Simm's Adm'x*, 79 Ky. 527, already cited in section 114.

²⁴⁷ *Showers v. Robinson*, 43 Mich. 502, 5 N. W. 988.

§ 171. Proceedings under the Writ.

The land being once bound, either by the judgment lien or by the writ, there remain the following steps before there can be a valid bid: (1) A good levy, supposing that the lien itself has not been gained by a levy on the land; (2) a lawful notice of the sale; (3) an appraisement, where the law demands it; (4) a public sale, at the right time and place, on such terms as the law allows, not in excess of the exigency of the writ, and fairly conducted; (5) and when, in this way, "a highest and best bidder" has been found, he becomes a purchaser by complying with the terms prescribed by the law,—that is, by paying to the sheriff, in cash, or in sale bonds with approved surety or sureties, the amount of his bid, unless the plaintiff himself is the highest bidder.

Where an attachment has been granted in proceedings against a defendant not actually summoned, it is the levy alone which gives jurisdiction to the court,—which will fail, if the land was not levied on as the law directs. The other steps as to attached lands must depend on the judgment awarding a sale or "attachment execution."²⁴⁸ The form of the execution in a number of states directs the sheriff to make the sums adjudged to the plaintiff out of the lands of the defendant, when sufficient goods and chattels cannot be found. But, except as to executions upon summary judgments for taxes, neither a levy on land nor the subsequent sale has been ever held void, as against the purchaser, after a return of the writ, on the ground that the officer did not state in such return his inability to find goods and chattels; nor upon outside proof that enough goods and chattels for the purpose were actually in sight.²⁴⁹

²⁴⁸ If the final judgment in an attachment suit does not sustain the attachment, or order the thing attached to be sold, the levy stands discharged. *Lowry v. McGee*, 75 Ind. 510; *Smith v. Scott*, 86 Ind. 350.

²⁴⁹ Under Michigan, St. § 7692, the writ proceeds, first, like a fieri facias at common law, and then proceeds, "and if sufficient goods and chattels can not be found," that then the amount be made out of the real estate. The same form is prescribed in many other states, e. g. New York, Code Civ. Proc. § 1369; Wisconsin, St. § 2969, subd. 1. But the sale cannot be invalidated because the officer failed to return that no goods and chattels could be found; and it seems, though not decided, that the presence of goods and chattels

The older and shorter statutes, which did not point out the mode of levying the fieri facias on land, caused a sort of American common law as to the requisites of the levy to grow up. The foremost proposition of that law is that the sheriff levying a writ of fieri facias or a warrant of attachment need not (and, in fact, cannot, without becoming a trespasser) take actual possession of the land, or expel the defendant.²⁵⁰ But the states differ as to the proposition whether it is necessary that, in levying an execution or attachment, the officer should go upon the premises, and whether he should post there a copy of his writ. We have, in a preceding section, enumerated the states in which the land is subjected to an attachment, by an entry with the town clerk or register of deeds; and, in all of these states, as will be found in the statutes there quoted, an entry upon the land is not required, though a service on the occupant is, in a few of them, and a posting where neither the defendant nor an occupant can be found.²⁵¹

An actual entry upon the land is not essential to the levy of an execution. In Kentucky, under an execution, the sheriff must either go upon the land or obtain the defendant's assent to a levy on the particular tract, or notify him thereof; while, under an attachment (and this is jurisdictional when the defendant is only constructively summoned), the officer must leave with the occupant, or, if there be no occupant, in a conspicuous place on the premises, a copy of the order.²⁵²

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cannot be shown dehors, to defeat the sale of land. *Johnson v. Crispell*, 39 Mich. 82; *Atwood v. Bearss*, 45 Mich. 474, 8 N. W. 55. As personal property in the county to which the execution is directed is understood, the addition of the words "in your county" is not hurtful. *Bunker v. Rand*, 19 Wis. 253. Levy not rendered void by presence of chattels. *Morgan v. Kinney*, 38 Ohio St. 610; *Treptow v. Buse*, 10 Kan. 170; *Drake v. Murphy*, 42 Ind. 82. It is different in ministerial sales for taxes.

²⁵⁰ It is said in *Morgan v. Kinney*, 38 Ohio St. 610: "No entry on real estate by an officer is necessary to constitute a levy. The officer may remain in his office, and not even go within view of the land. He need not seize on one twig, turf, etc., as a symbol. His indorsement on the execution of a levy will constitute one, to all intents and purposes."—quoted from Gilbert on Sheriffs.

²⁵¹ See section 167, note 146.

²⁵² See, as to levy of attachment, Kentucky, Code Prac. § 202, subd. 1; *McBurnie v. Overstreet*, 8 B. Mon. 300. It is said, in *Waters v. Duvall*, 11 Gill (1290)

The levy of an execution upon lands takes place in analogy to the levy of a fieri facias on goods and chattels, known to the common law,—but differs from it mainly in this: that it does not involve any act of possession on the part of the officer, even if it comprises an entry. It must, like the common-law levy on chattels, be made while the execution is alive; that is, before the return day.²⁵³ The "entry of the estate," as it is called in the older cases, or description of the land which is to be sold, upon the back of the execution or attachment, is the essential part of the levy.²⁵⁴ Nothing can be sold that has not been levied on. The sheriff's deed must rest on the levy. This must not only identify the land, but also the defendant's interest therein,—whether it be in fee simple for life, or for years; in severalty or an undivided share, and what share; and, if it is not an interest in possession, it ought to appear when his estate in remainder or in reversion takes effect.²⁵⁵

But it seems that a levy on the whole estate, and a sale made in pursuance thereof, would pass to the purchaser the title to such smaller estate in duration or quantity as the defendant owns.²⁵⁶ The levy is good if it, even in a general way, identifies the land, though it seems that such general words as "all of A B's land in

& J. 37, that there can be no sale except upon a "seizure"; but nothing is meant except the indorsement, or "entry," of the land on the writ. The English cases cited which speak of seizure are all about sales of chattels.

²⁵³ In *Wood v. Weir*, 5 B. Mon. 544, damages were awarded against the attorney of a plaintiff in attachment, who had advised and induced the sheriff, in attaching the defendant's house, to take possession.

²⁵⁴ *Rand v. Cutler*, 155 Mass. 451, 29 N. E. 1085. "Levy" and first notice run into each other. The return must show that the former was made before return day. *Slater v. Lamb*, 150 Mass. 239, 22 N. E. 892. The cases refer to the statute, but the rule is universal.

²⁵⁵ For descriptions deemed sufficient, see *Bell v. Weatherford*, 12 Bush, 506. The rules as to certainty of description, given in chapter 2, § 6, apply to levies under execution, and to notices of sale. As the sale itself is oral, the minds of the sheriff and the bidder meet only on the written or printed notice. The description therein contained is that by which the sheriff sells and the purchaser bids. *Ela v. Yeaw*, 158 Mass. 190, 33 N. E. 511 (90 feet, subject to changes by agreement, deemed sufficient).

²⁵⁶ *Brown v. Smith*, 7 B. Mon. 361 (levy and sale of defendant's "right, title, and interest" good enough). Though the sale is based on the levy, it was held, in *Frink v. Roe*, 70 Cal. 296, 11 Pac. 820, that the debtor's title, acquired between levy and sale, passes.

— county," or even "in — town," are insufficient. The levy, from which the sale must derive its force, should be made during the lifetime of the execution; but when the return is made it does not lie in the defendant's mouth to show that the levy had been written out after the return day.²⁵⁷

Some of the older cases arising in the West, when clerical skill among sheriffs was rare, proceed very far in upholding loose descriptions in the levy, on the ground that the purchaser must have such land as he bought; even allowing parol evidence to come in to show what the officer offered for sale.²⁵⁸ In New York, and the states which have framed their laws of procedure after its model, the statutes do not speak of any levy on real estate. After stating what estates in lands are liable to execution, they proceed at once to say how land is to be sold, and what notice must be given of the sale. The publication of this notice is thus the equivalent of a levy, and the description of the land seized appears for the first time in this notice.²⁵⁹ Now, whether the levy is indorsed as such, and followed

²⁵⁷ *Waters v. Duvall*, *supra*, gives several instances of very general designations. *Lake, Petitioner*, 15 R. I. 628, 10 Atl. 653, where the sheriff, after leaving office, had leave to insert a description to sustain the sale. Other judgment creditors cannot object, when the defendant has waived by deed the defective description. *Willis v. Nichols*, 5 Tex. Civ. App. 154, 23 S. W. 1025.

²⁵⁸ *Reid v. Heasley*, 9 Dana, 325 (a description which would not now be upheld). See, as to sufficiency of description, also: *Wing v. Burgis*, 13 Me. 111; *Marshall v. Greenfield*, 8 Gill & J. 349; *Bank of Missouri v. Bates*, 17 Mo. 583; *Parker v. Swan*, 1 Humph. 80. As the sheriff's deed must follow the return on the execution, these cases necessarily (being on collateral attack) came up on such deed. In *Elliott's Lessee v. Knott*, 14 Md. 121, a levy on a tract called "Penrhyn" as "Penyrun" or "Penneyrun," and selling it by the name of "Pennyrine," was held good, it not appearing that there was more than one tract of such name.

²⁵⁹ New York, Code Civ. Proc. § 1434; Wisconsin, Ann. St. §§ 2993, 2994; Indiana, Rev. St. §§ 727-741,—speak of a levy generally, both on personality and realty, but do not indicate the manner of levying on the latter, in any way. In the New England states, Kentucky, and Georgia, etc., where a judgment is not a lien on land, the levy is indispensable. In states like New York, California, etc., it is really of no importance. See *Wood v. Colvin*, 5 Hill, 228; followed in *Bagley v. Ward*, 37 Cal. 131. California, Code Civ. Proc. (copied by several of the Pacific states), says, in section 688: "Until a levy, property is not affected by an execution." But it seems, from the

in the notice of sale, or appears for the first time in the notice, it must not be drawn so as to deter bidders from bidding the full and fair value of the parcel which the officer proposes to sell. Thus, where the defendant has no homestead in the tract, and it is not actually set off to him by metes and bounds, but a sale is made subject to homestead right, it is void, as the bid must have been affected to the defendant owner's injury.²⁶⁰

It may be convenient to give as an illustration of further proceedings the statute of Wisconsin, drawn mainly from that of New York, and similar to that of several other Northwestern states. "The time and place of holding any sale of real estate," etc., "shall be publicly advertised for six weeks successively as follows: (1) A written notice thereof, describing the real estate to be sold, by setting forth the name of the township or tract, and the number of the lot, if there be any, and, if there be none, by some other appropriate description, shall be fastened up in three public places in the town where such real estate shall be sold;²⁶¹ and if such sale be in a town different [from that of the situs], then in three places in the town [of the situs]. (2) A copy of such notice shall be printed once a week in a newspaper of such county, if there be one.²⁶² (3) If there be [none], and the premises to be sold are not occupied by any person against whom the execution is issued," etc., "then such notice shall be published in a paper printed at the seat of government," etc.²⁶³ Under such a statute the first publication must precede the day of sale by

course of argument and opinion in *Southern California Lumber Co. v. Ocean Beach Hotel Co.*, 94 Cal. 217, 29 Pac. 627, that the advertisement when first made is a sufficient levy.

²⁶⁰ *Whitefield v. Adams*, 65 Vt. 632, 27 Atl. 323.

²⁶¹ In many states, "posting," by written or printed bills, is the only means required by law to advertise execution sales. Where the sale is subject to redemption, and no real competition is expected, a newspaper advertisement is nothing but waste; and the main or only object of the law in requiring it is to subsidize the newspaper press. Posting must be done in cities, as well as in rural towns. See Michigan, Act No. 166, 1885, and *Kopmeier v. O'Neil*, 47 Wis. 593, 3 N. W. 365.

²⁶² Six weeks is the time in New York, Michigan, Wisconsin, etc. Other states make it four weeks, or thirty days, or three weeks. In Kentucky, sales of real estate under execution are posted for fifteen days.

²⁶³ As to length of time, see *Herrick v. Graves*, 16 Wis. 157. In Michigan, and many other states, the notice is published in an adjoining county, if

full six weeks; i. e. the day of sale is reached by adding 42 at least to the day of first publication.²⁶⁴ The same notice (posted and published) may be headed with the style of two or more executions against the same defendants under which the same lands are to be sold.²⁶⁵ "Every sale," etc., "shall be at public vendue, between the hours of 9 a. m. and the setting of the sun." Statutes in some other states have provided for an adjournment either for want of bidders or "when it is for the benefit of all parties in interest," or when the sale cannot be completed by sundown. It is doubtful whether a sheriff, without such express authority, or without a consent in writing, can adjourn a sale, and proceed on another day, without a new posted and published notice.²⁶⁶ When real estate offered for sale, etc., shall consist of several known lots, tracts, or parcels, such lots, etc., shall be separately exposed for sale; and if any person claiming to be the owner of any portion of such estate, or of such lots, etc., or claiming to be entitled to redeem any such portion, shall require such portion to be exposed for sale separately, it shall be the duty of the sheriff to act accordingly. No more of any real estate shall be exposed for sale than shall appear necessary to satisfy the execution.²⁶⁷

that of the situs should have no newspaper. In the New England states, a notice, when practicable, must be served on the defendant personally. As to its requisites, see *Croacher v. Oesting*, 143 Mass. 195, 9 N. E. 532.

²⁶⁴ *Carnick v. Myers*, 14 Barb. 9.

²⁶⁵ *Herrick v. Graves*, *supra*.

²⁶⁶ Before any statutes authorizing adjournments of an execution sale, the practice was approved by the courts of New York, Pennsylvania, and New England, in cases of necessity. See *Warren v. Leland*, 9 Mass. 265; *McDonald v. Neilson*, 2 Cow. 139; *Russell v. Richards*, 11 Me. 371; *Lantz v. Worthington*, 4 Pa. St. 153; *Richards v. Holmes*, 18 How. 143, 147 (which refers to the "elements," i. e. storms or floods, which might prevent the attendance of bidders); *Reynolds v. Hoxsie*, 6 R. I. 463 (where a sale of land at an adjourned bidding was sustained). The R. I. statute, since 1855 (now chapter 223, § 13), allows the sheriff to adjourn a sale, by one week's newspaper advertisement, "in case of accidents or extraordinary storms." The New Jersey statute (chapter 8, "Sale of Land") gives the sheriff the broadest discretion as to adjournments. *Morris v. Woodward*, 25 N. J. Eq. 32. So, in North Carolina, for want of bidders, the sale may be postponed from day to day. Code, § 455; *Mayers v. Carter*, 87 N. C. 146. Crock. Sher. § 463, thinks an adjournment might be had on general principles; but this would be dangerous.

²⁶⁷ Wis. Ann. St. § 2995. Under a similar law in North Dakota (Comp. Laws, § 5144), a sale en masse, instead of one by parcels, was held absolutely void.

When enough parcels have been sold to satisfy the debt and costs, of course the sale of any additional land is unauthorized and void. And unless there is a statute authorizing the sale of land by entire lots, according to recorded plats, or according to the divisions of the United States survey, or to sell the whole of lot levied upon, where it is not fairly susceptible of division, the sheriff must not sell more land than will pay the debt, unless he has first tried to get a bid of the debt and costs for less than the whole tract or parcel. And sales have been set aside, or even held void upon collateral attack, for a very trifling excess,—a rule of rather doubtful benefit to the defendant owner.²⁶⁸ The following provision of the Wisconsin statute is rath-

Power v. Larabee, 3 N. D. 502, 57 N. W. 789. Contra, Hoffman v. Buschman, 95 Mich. 538, 55 N. W. 458 (only irregularity); citing, from same state, Cavenaugh v. Jakeway, Walk. Ch. (2d Ed.) 344; Blair v. Compton, 33 Mich. 422. To same effect (sale not void) is Lewis v. Whitten, 112 Mo. 318, 20 S. W. 617; Hudepohl v. Liberty Hill Water & Min. Co., 94 Cal. 588, 29 Pac. 1025 (sale en masse not void, but voidable; arguendo, it being a direct proceeding to set the sale aside). Even in the Dakotas, land may be sold in gross, when it has first been offered in parcels and the sale in gross brings more. First Nat. Bank of Deadwood v. Black Hills Fair Ass'n, 2 S. D. 145, 48 N. W. 852. The elder case of Day v. Graham, 6 Ill. 435, allows the sale to be set aside, on motion or by bill in chancery, where the plaintiff is the purchaser and still holds the title. Sale of one tract, and equity of redemption in adjoining tract, in one bid, is a gross abuse of discretion. Dougherty v. Linthicum, 8 Dana, 194. We cannot consider the many cases where on direct attack it was determined whether a sale en masse should be set aside or not.

²⁶⁸ Pepper v. Com., 6 T. B. Mon. 30; Isaacs v. Gearheart, 12 B. Mon. 231. It was held that no waiver will cure the defect, unless made by a writing such as will pass title under the statute of frauds; but, when the defendant had waived the excess, the objection could not be raised by holders of subsequent levies. Thomas v. Thomas, 87 Ky. 343, 10 S. W. 282. An excess of 6½ cents was disregarded in Adams v. Keiser, 7 Dana, 209; in Morrison v. Bruce, 9 Dana, 211, an excess of \$5 upon \$1,400, where so many acres had been sold off one side of a tract. In New Jersey, it is held that an execution which directed the sheriff to sell so much of the tract means only what can be severed conveniently. Vanduyne v. Vanduyne, 16 N. J. Eq. 93 (even before deed to purchaser). Where enough personalty has been seized and held by the officer, though not sold, a levy and sale thereafter of the defendant's land is void. White v. Graves, 15 Tex. 187, and cases there quoted. See Cornelius v. Burford, 28 Tex. 202, for state of fact indicating that the debt was not satisfied by such seizure; also Green v. Burke, 23 Wend. (N. Y.) 501; Churchill v. Warren, 2 N. H. 298. As to the effect of selling land for more than the execution

er peculiar to it, and probably relates only to the posted bills, not to the newspaper advertisement: "The omission of any sheriff," etc., "to give the notice of sale herein required, or the taking down or defacing any such notice when put up, shall not affect the validity of any sale made to a purchaser in good faith, without notice of any such omission or offense."²⁶⁹ The next provision is very general, and is implied by the common law where not laid down by statute: "The sheriff or," etc., "to whom any execution shall be directed, and the deputy," etc., "holding such execution and conducting any sale," etc., "shall not directly or indirectly purchase," etc., "at any sale by virtue of such execution; and every purchase made by such sheriff, officer, deputy, or to his use, shall be void."²⁷⁰ In a few states another step must precede the sale, namely, the appraisement. The value being ascertained by means thereof, there can in some states be no accepted bid at all unless it reaches two-thirds of the appraised value, as in Ohio, Indiana, Nebraska, and Kansas; or a purchase at or above two-thirds of the appraised value is free from redemption, while a purchase at a lower figure is redeemable; as in Kentucky. In Indiana the judgment may, in accordance with a written contract waiving the privilege of the valuation laws, dispense with the appraisement; and where a part of the judgment may be thus enforced a sale of a single tract without appraisement is valid.²⁷¹ In that state, property which the debtor has fraudulently

calls for, cases can hardly be found but in those states in which execution sales are on credit. Very few cases can be found outside of Kentucky; for, wherever such sales are subject to redemption, it is but seldom that there is more than one bid, and that is for the debt and costs, or for less. Compare excessive extent in New England states, hereafter, under "Levy by Extent."

²⁶⁹ Wisconsin, Ann. St. § 2998. There has been no reported decision under this section.

²⁷⁰ Wisconsin, Ann. St. § 2999. How incurably bad the officer's purchase is appears in *Etlinger v. Tansey*, 17 B. Mon. 369. The sheriff may receive a single bid before the sale (*Brannin v. Broadus*, 94 Ky. 33, 21 S. W. 344); but cannot bid at his own discretion, for the benefit of an absent buyer. If he does, the purchase is void. *Caswell v. Jones*, 65 Vt. 457, 26 Atl. 529. The position of the text is, aside of statutes, wholly undisputed.

²⁷¹ See Ohio, St. §§ 5389-5391 (sections 5415, 5416, on failure to get a bid of two-thirds, a new appraisement may be ordered; after three failures, the court may name an upset bid). Under order of sale, terms will be made one-third cash, residue in 9 and 18 months. Indiana, Rev. St. §§ 745, 754. *Mugge v.*

conveyed, and by implication such as he has fraudulently bought in the name of another, is to be sold without appraisement; that is, after a judgment setting the conveyance aside, or declaring the purchase to have been made fraudulently by the debtor.²⁷² In Kansas, also, land must bring two-thirds of the appraised value (except where the contract waives appraisement, and is followed by a judgment to that effect); and when land is put up to sale under execution no notice can be taken of mortgages or other liens. The sheriff must cause the appraisers to appraise the land, not (as in Nebraska) the debtor's net interest therein.²⁷³ It may be stated here that in Kentucky the sale of incumbered lands under execution gives no title at all, but only a permanent lien, bearing 10 per cent. interest on the nominal bid, to be enforced by suit in equity, and subordinate, of course, to all older incumbrances.²⁷⁴

It seems that the decision of the appraisers is in its nature judicial, and cannot be impeached collaterally for mere error of judgment.

Helgemeier, 81 Ind. 122. When the judgment does not dispense with the appraisement, the execution cannot do so. Stotsenburg v. Same, 75 Ind. 541. Nebraska does not allow a waiver of appraisement, but, by section 5028 of its Revision, the land of a debtor to the state is sold absolutely; and, ordinarily, after two failures in getting a bid of two-thirds, a new appraisement may be demanded. In Kentucky, the appraisement cannot be waived in the contract, but may be, after execution is issued (*Anderson v. Briscoe*, 12 Bush, 344) and must be waived, if the defendant wants to give up land in another county for sale. In Nebraska, where execution sales must be reported and confirmed (see section 162, note 24), the lack of proper appraisement cannot be raised after confirmation by collateral attack. Confirmation with like results obtains in Kansas (Gen. St. 4556) and the Dakotas (Code Civ. Proc. § 343).

²⁷² *Sherman v. Hogland*, 73 Ind. 480; *Mugge v. Helgemeier*, *supra*.

²⁷³ Kansas, Gen. St. § 4550 (section 4551, waiver in contract); *De Jarnette v. Verner*, 40 Kan. 224, 19 Pac. 666; *Capitol Bank v. Huntoon*, 35 Kan. 578, 591, 11 Pac. 369. The sale of incumbered land under execution is thus made impracticable. It lies beyond our purpose to show how a judgment creditor can reach such lands in this state.

²⁷⁴ Kentucky, St. 1894, § 1709 (incumbered by vendors' liens, or which the owner has incumbered by mortgage or deed of trust or otherwise). As the incumbrance has no necessary bearing on the price bid,—such bid being merely the measure of the lien which the bidder seeks to acquire,—he may contest the older incumbrances. *Atkins v. Emison*, 10 Bush, 9. Quære if, by consent of mortgagee and mortgagor, the sheriff can still sell the fee? *Mercer v. Tinsley*, 14 B. Mon. 223, arose before the present statute.

But where the appraisers fall into a mistake (such as appraising a tract other than the one to be sold), or are guilty of fraud, equity may relieve by setting aside a sale in Indiana, Nebraska, and Kansas, or by making it, in Kentucky, subject to redemption.²⁷⁵ In Pennsylvania, Delaware, and Indiana, under an old law, which has wholly outlived its usefulness, the rents and profits for a term of years, not exceeding seven, must first be offered for sale; and such offer is valid only if they have been valued by the appraisers. A failure to observe this form renders a sale of the fee void; at least in Indiana.²⁷⁶

The notice of sale names time and place; but both of these are more or less fixed by the statute, with a view to publicity and to collecting a crowd of bidders. Hence a deviation as to place (a sale at other than the statutory time does not often happen) is considered prejudicial to the rights of the defendant, and it has in many cases been held to render the sale void, so that even the defendant's acquiescence at the time would not cure the defect. As the United States courts under the acts of congress have to follow the state practice as to executions, sales by the marshal have in several instances been held to be void, because not held at the proper place.²⁷⁷

Where the execution or the return to an execution under which land has been sold shows irregularities which have not really occurred, and the sale has been acted upon by sheriff's deed, and more particularly where peaceable possession has been taken and retained by the purchaser, the court from which the execution issued has

²⁷⁵ Lawrence v. Edelen, 6 Bush, 55. Contra, Vallandingham v. Worthington, 85 Ky. 83, 2 S. W. 772. And compare New England authorities in next section.

²⁷⁶ Indiana, Rev. St. § 753. In Pennsylvania and Delaware, the writ under which land is sold is a levavi facias, contrived at law, to reach the current rents or produce. Hence the sale of the seven years' term followed naturally as the first step towards selling the fee. The older Indiana cases quoted by Freeman on Executions, in a note to his section 283,—that is, Adler v. Sewell, 29 Ind. 598, Brownfield v. Weicht, 9 Ind. 394, and Law v. Smith, 4 Ind. 56,—sustain the validity of the sale against attacks on this score. In Pennsylvania and Delaware, it seems, no difficulties have grown out of this antiquated provision.

²⁷⁷ Moody v. Moeller, 72 Tex. 635, 10 S. W. 727 (before United States courtroom instead of county courthouse); Sinclair v. Stanley, 64 Tex. 67 (a venditioni cannot name another than the regular place); Smith v. Cockrill, 6 Wall. 756; Jenners v. Doe, 9 Ind. 466.

often, even after a great lapse of time, allowed the execution or return to be amended in accordance with the true state of facts, in aid of the title and possession. And this has been done though the person who issued or who acted upon the execution had long before ceased to hold the office or deputation of office as clerk or sheriff. A sheriff, at least, is never wholly discharged from the service of a writ, which has been put into his hands, except after it has been truly and fully executed; and as to process, it may, under the orders of the court, be corrected by the successor of the clerk who committed the clerical error.²⁷⁸

As to the liability of a bidder at execution to pay his bid, the distinction has been drawn that when there is no title at all in the defendant he will be excused, but when the title is defective (for instance, when the land is incumbered) the maxim of *caveat emptor* compels him to pay.²⁷⁹

NOTE. In Delaware land is subjected to execution in a somewhat antiquated manner, set forth in chapter 111 of the Laws of Delaware. Sections 3-9 of the chapter provide for an inquisition of the lands seized under a *fieri facias*; and if the rents and profits for seven years, less reprises, will satisfy the demand, they will be so applied; if they are insufficient, or if new executions come in, and they and the residue of the first cannot be thus satisfied, the sheriff shall return accordingly, and thereupon a writ or writs of *venditioni exponas* will be issued under which the land may be sold. Under section 11, and those following it, the execution creditor may take out an *elegit*, under which the creditor may obtain possession of the debtor's land; any dispute with third persons to be settled by a sheriff's jury, whose inquest is not conclusive on a subsequent ejectment. Unimproved lands (see section 20) may be seized and sold under *levari facias*.

²⁷⁸ *Dewey v. Peeler* (1894) 161 Mass. 135, 36 N. E. 800 (quoting earlier Massachusetts cases), and *Cawthorne v. Knight*, 11 Ala. 268 (on the general power of amendment); *Morse v. Dewey*, 3 N. H. 535; *Hayford v. Everett*, 68 Me. 505; *Buswell v. Eaton*, 76 Me. 392; *Whitehall Bank v. Pettes*, 13 Vt. 395; *Wright v. Nostrand*, 94 N. Y. 31, 47; *Rose v. Ingram*, 98 Ind. 276 (on the power of amending executions; particularly, so as to make them conform to the judgments on which they were issued. It was said that the motion to amend may be made in the new suit [in the same court] in which the title is attacked, citing *Balch v. Shaw*, 7 Cush. 292.) The force of the case is somewhat weakened by the closing remark (supported, in part, by *Hunt v. Loucks*, 38 Cal. 372) that, where an execution is not void, but voidable, and consequently amendable, it is not subject to collateral attack.

²⁷⁹ *Julian v. Bell*, 26 Ind. 220.

§ 172. Redemption.

The law, in many of the states, has wholly abandoned the endeavor of obtaining full prices at judicial or execution sales of land. Instead of selling the land at something like the usual credits, the purchaser is compelled to pay in cash, often on the spot, without a previous opportunity to examine the title,²⁸⁰ which puts the judgment creditor, who (if he buys) has the land already paid for in advance, at an immense advantage; and, what is worse, the land is sold subject to redemption, which shuts out the general public in nearly all cases, and confines the bidding to those who have liens on the property.²⁸¹

With regard to this right of redemption, we must refer to sales under execution; also to the process in those New England States in which land is not sold under execution, but is "extended," or "set out" to the creditor at an appraised value; also to judicial sales for debt under decree of court.²⁸²

We have, then, three classes of states: In the first, no redemption is allowed after a judicial or execution sale in any case; in the

²⁸⁰ The sheriff need not receive a bid, unless accompanied with the full amount in cash. *People v. Hays*, 5 Cal. 68. As a matter of constitutional law, he may refuse to take certified checks, or anything but gold and silver coin or legal-tender notes. Such terms have often been insisted on purposely to deter outside bidders.

²⁸¹ When sales on credit were first introduced, grave constitutional objections were raised. A stranger bids and gives his bond. The judgment is thereby satisfied, and the creditor must take this bond (with or without a lien; in case of chattels, always without liens) in place of his debtor's liability; which comes very near making such bond of a third party, with securities acceptable to the sheriff, a legal tender for the payment of the debt, though such bond is not made up of either gold or silver coin. But losses on sale bonds have been comparatively rare, and general convenience has, in the states which have adopted the system, shown it to be of great advantage to both debtor and creditor, in making it possible to realize fair prices at judicial and execution sales.

²⁸² It will be seen that in Connecticut executions are always extended on land; in New Hampshire, on all unencumbered lands; in Maine, Vermont and Massachusetts, there may be either sale or extent. Rhode Island proceeds by sale, like other states. The redemption from extent will be discussed in connection with "Levy by Extent."

second, it is allowed in all cases; in the third, redemption is cut off, either by a bid which reaches a named proportion of the appraised value, or by a decree which provides for a sale on credits. Or, generally, land adjudged to be sold is sold absolutely; while land sold under a general execution is subject to redemption.²⁸³

The following states allow no redemption after a sale of any kind (unless it be for taxes or for assessments laid under the taxing power): Connecticut (where land is not sold under execution), Rhode Island, New Jersey, Pennsylvania, Delaware, the District of Columbia, Maryland, Virginia, and West Virginia (in which last two states land is only sold under decree), the Carolinas, Georgia, Florida, Ohio, Mississippi, Missouri, Wyoming; and Texas.²⁸⁴

²⁸³ The writer is best acquainted with decretal sales in his own state (Kentucky), where, until 1877, they were always free from redemption, and where, until the court of appeals in 1875 made an end to the practice, it was usual to open the biddings upon the offer of an advance of 10 per cent. over the previous bid. In 1877, under the stress of the hard times, a law was enacted allowing a year's redemption, with possession remaining as before the sale, whenever the highest bid does not come up to two-thirds of the appraised value. But the bids nearly always come up to this limit; and whenever the land is worth more than the debt, and often when it is worth less, outsiders will bid. The prices obtained are just as good as those obtained by auctioneers at voluntary sales. Friendly suits have actually been brought, and decrees entered, because bidders would come in greater numbers and bid more freely at a chancery than at an unofficial sale, and because the purchaser has, besides the lien reserved, to give personal security, and his liability and that of sureties can be enforced by summary process, while the commissions of the master are less than those of an ordinary auctioneer. The terms are generally on credits running from 6 to 18 months, sometimes with a small cash payment. The bidder, who is returned by the master, is always given time to examine the title before the sale is confirmed. In Louisville at least, if not in the state at large, all taxes and assessments are paid out of the purchase money. Only where land is sold at the instance of a street contractor for special assessments, a long time for redemption is given, as the sale is really for a tax. But suits for the city taxes of Louisville are conducted in every respect like suits on a mortgage or private lien. The result has been highly satisfactory.

²⁸⁴ In some of these states (as in Rhode Island and Virginia) the word "to redeem" is used to denote the act of the debtor of stopping a sale by paying off the decree,—e. g. in *Strayer v. Long's Ex'r*, 89 Va. 472, 16 S. E. 357. So, also, in Wisconsin, where judicial foreclosure sales are not redeemable. See Rev. St. §§ 3165, 3166 ("may redeem before sale").

The right to redeem is given in all sales for debt in Indiana, Illinois, Wisconsin, Iowa, Minnesota, and Washington (for one year from the day of sale); in California, Nevada, Idaho, Montana, and the Dakotas, for six months; in Alabama for two years, under the same conditions as after a sale under the power in a deed of trust. In Oregon land can be redeemed only within four months from confirmation. In Nebraska, only till confirmation.²⁸⁵

In Massachusetts, Maine, and New Hampshire land may be redeemed for 12 months, and in Vermont for 6 months, after an execution, possession being given to the purchaser at once under rather onerous conditions, the right to redeem from a purchaser being the same as after an extent from the creditor, which will be referred to hereafter. In New York the debtor has one year within which to redeem from execution sale. But in these four states a sale under decree is absolute at once, unless the biddings be opened or it be set aside on exceptions. The greater chance of selling land at a fair price under decree is a good reason for the distinction. It is the same in Michigan.²⁸⁶

²⁸⁵ Indiana, Rev. St. §§ 766-775 (the process to carry out a judgment to sell is here called an execution); Illinois, Rev. St. c. 77, § 18 (applies in terms alike to executions and to chancery sales); Minnesota, St. c. 66, §§ 323-326 (as to executions), chapter 81, § 34 (as to sales under decree; gives one year from date of confirmation); Dakota Territory, Code Civ. Proc. §§ 343-353; Iowa, St. § 3102 (applicable to decretal sales; *Barrett v. Blackmar*, 47 Iowa, 565); California, Code Civ. Proc. §§ 700, 701 (which is almost literally copied in Nevada, Idaho, and Montana). The Alabama statute has been referred to in chapter on "Incumbrances," § 94 ("Power of Sale"). Nebraska, Consol. St. § 5032, refers to sales of both kinds. In California it was held, under the practice act of 1851, that a decretal as well as an execution sale may be redeemed from. *Knight v. Fair*, 9 Cal. 117. The writ given by section 684 of the present Code of Procedure to carry out a decree of sale is said, in Southern Cal. Lumber Co. v. Ocean Beach Hotel Co., 94 Cal. 217, 29 Pac. 627, not to be an execution; but the sections giving the right to redeem do not speak of an execution. In Washington, under the Code of 1873, it was held in *Parker v. Dacres*, 2 Wash. T. 439, 7 Pac. 893, that a decretal sale was irredeemable, and it was said that the Code of 1881 made this still plainer; but sections 513, 520, of the Code of 1891, seem to give the right to redeem.

²⁸⁶ For New England states, see next section. Chapter 172, § 32, Pub. St. Mass., gives the same right of redemption after sale as § 31 on extent, upon exactly the same terms, etc. As to redemption from execution, see, further: New York, Code Civ. Proc. §§ 1446-1453; Michigan, Ann. St. §§ 6120-6127;

In Kentucky a sale either under execution or under decree can be redeemed within one year when the bid is less than two-thirds of the appraised value, but there is no redemption when the bid equals or exceeds two-thirds.²⁸⁷

In Kansas the first redemption law was enacted in 1893, under the stress of the hard times, and all contracts waiving its benefits beforehand are declared void. The owner retains possession, and has 18 months wherein to redeem from sales for debt of all kinds; where the land is unimproved or unoccupied, only 9 months. During the first 12 months of the 18, or the first 6 of the 12, the debtor alone can redeem; thereafter, and for 3 months, any creditor holding a lien (other than a mechanic's lien) may do so and hold for his own lien and the redemption money. Common interest, taxes, and costs are to be added to the bid.²⁸⁸

In Tennessee the right of redemption may be exercised within two years, whenever land is sold under execution, under power of sale in a mortgage, or under decree of court. In the first-named case it cannot be waived or lost, but it may be waived in a deed of trust containing such a power; and, lastly, the complainant can have a

Wisconsin, Ann. St. §§ 3001-3006. That decretal sales are not redeemable in New York is plain enough. See, for Michigan, as to sales of mortgaged lands under a decree in chancery, sections 6707, 6708, where the sale is not even reported and deed made at once, with effect of foreclosure. But where land is sold under the mechanic's lien law, the sale is subject to redemption for 15 months from filing the bill. Thus, if this time has elapsed between bill and sale, there is no redemption. *Id.* § 8391. In Wisconsin, see, as to sales under decree to enforce a mortgage, sections 3168, 3169; under decree on mechanic's lien, section 3326.

²⁸⁷ The law as to appraisal on executions in Kentucky dates back to the beginning of the century; on decretal sales (which embrace lands attached before judgment), to 1877. *Vallandingham v. Worthington*, 85 Ky. 83, 2 S. W. 772, noted in the preceding section, shows how equity will extend the time for redemption where the debtor lost it by mistake of the appraisers. Sales, in an administration suit, of land for payment of debts, are subject to redemption. *Graves v. Long*, 87 Ky. 441, 9 S. W. 297. Sales for partition, maintenance, or reinvestment are not. *Wooldridge v. Jacob*, 79 Ky. 250. An attorney of record cannot, on behalf of the defendants, waive the right of redemption. *Graves v. Long*, *supra*.

²⁸⁸ See acts of March 11 and 17, 1893. These acts, in their application to antecedent debts, were held unconstitutional by the supreme court of the state in *Greenwood v. Butler*, 52 Kan. 424, 34 Pac. 967.

decree ordering sale free from redemption, by allowing terms of credit, altogether not less than six months, nor more than two years.²⁸⁹ The right to redeem is purely statutory, and cannot be extended by a court of equity on the score of sickness, mental infirmity, or hardship. Such is the view of the matter entertained in the Western states, where redemption from execution sales is most prevalent, unless where the statute permits it to be done on special grounds. Thus, in Minnesota, the person wishing to redeem as mortgagee or lienholder, and attacking the mortgage sale or judgment as fraudulent and void, is allowed to deposit the redemption money in court till the question is tried.²⁹⁰

The rate of interest varies. In New York and Kentucky the party redeeming must pay or tender the principal with interest at the rate of 10 per cent. per annum; in California and other mining states the rate is 12 per cent.; in most of the Western states 8 per cent.; in New England only 6 per cent.; but the debtor must reimburse the purchaser also for taxes, insurance, repairs, and even improvements, with interest on the outlays for all these purposes.²⁹¹

The provisions by which judgment or other lien creditors may redeem are in some states highly complicated. The parties having that right are in many of the states called "redemptioners." One such creditor having redeemed from a purchase under a higher lien, another creditor having a still younger lien may again redeem from

²⁸⁹ Tennessee, Code, §§ 2947-2950. A decree to sell on credits free from redemption can be made only on plaintiff's application. *Glass v. Porter*, 7 Baxt. 114. The application may be recited in the decree. *McBee v. McBee*, 1 Heisk. 558, 563. To require, in case of actual appearance, a small cash payment, such as cannot interfere with a fair price, held allowable. *Id.*; *Ewing v. Cook*, 85 Tenn. 332, 3 S. W. 507 (right to redeem cannot be sold by same creditor). It seems that a decree to sell absolutely, without proper grounds, is erroneous, *Chadbourn v. Henderson*, 2 Baxt. 460; but a sale made under such a decree, it seems, would be valid and absolute. Deed of trust providing for cash sale subject to redemption, the court must not order credit sale free from it. *Clark v. Jones*, 93 Tenn. 639, 27 S. W. 1009.

²⁹⁰ *State v. Kerr*, 51 Minn. 417, 53 N. W. 719; *Cameron v. Adams*, 31 Mich. 426; *McConkey v. Lamb*, 71 Iowa, 636, 33 N. W. 146; *Hyman v. Bogue*, 135 Ill. 9, 26 N. E. 40. There are decisions to the opposite effect in the New England states, as will be shown hereafter under "Levy by Extent." See Minnesota, Act April 14, 1893, c. 82.

²⁹¹ Kentucky, St. 1894, § 2364 (decretal sales), § 1684 (execution sales).

him; all within a time named in the statute, sometimes longer, in the aggregate, than that given to the original debtor.²⁹²

Thus, the Wisconsin act, which is taken from those of New York and Michigan, and is typical, directs that the following persons may redeem: (1) The person against whom the execution was issued, and whose right and title was sold; (2) if he be dead, his devisee, to whom the land sold was devised, or his heirs; (3) any grantee who shall have acquired an absolute title by deed, sale under mortgage or execution, or otherwise, or to any lot or parcel which was separately sold. These stand upon the same ground, and have only one year within which to redeem. But any creditor of the execution defendant who has "a judgment rendered or mortgage duly recorded," which is a lien, may, if the debtor, his devisee, heirs, or assigns have failed to redeem within the year, pay the amount paid at the sale, with interest at 10 per cent. a year, within 15 months of the sale, and will thereby acquire the rights of the purchaser, subject to be defeated by creditors having inferior liens, coming in, in like manner, within the 15 months. The second or subsequent creditor, in redeeming, must repay the redemption money, with 10 per cent. a year, together with the lien debt of the first creditor (unless it has ceased to be a lien). In New York the statute gives 24 hours within which to redeem from a creditor who has redeemed on the last day; for which purpose a Sunday is counted out, or taken as a dies non.²⁹³

²⁹² Indiana, Rev. St. §§ 771-774, are very prolix, and have led to much litigation. A judgment creditor may redeem in the absence of redemption by the owner or part owner, without regard to order of priorities among such creditors. He pays to the clerk of the court, who enters the fact on his "lis pendens" record. The last redemptioner may resell by a venditioni exponas. A lien holder having a recorded lien may also redeem. See *Mitchell v. Hedges*, 87 Ind. 496 (manner of redemption); *Taylor v. Morgan*, 95 Ind. 463; *Patterson v. Rosenthal*, 117 Ind. 85, 19 N. E. 618 (venditioni); *Hervey v. Krost*, 116 Ind. 271, 19 N. E. 125 (redemption by lien holder); *O'Brien v. Moffitt*, 133 Ind. 660, 33 N. E. 616 (lien holder redeems in same manner as judgment creditor. Held in same case that the assignee of certificate of purchase stands in the same position as the purchaser); *Bowen v. Van Gundy*, 133 Ind. 671, 33 N. E. 687 (manner of paying redemption money to clerk).

²⁹³ See sections in each Revision or Code next following those on redemption by owner. A creditor whose lien has been lost (as, if he has been made party to a foreclosure suit, and there was a sale not reaching his claim) cannot redeem; *People v. Bacon*, 99 N. Y. 275, 2 N. E. 4. Secus if there be

In California and the states which have borrowed its laws (including the Dakotas), land sold subject to redemption may be redeemed (1) by the judgment debtor or his successor in interest, in the whole or any part of the property; (2) by a "redemptioner," i. e. "a creditor having a lien by judgment or mortgage on the property sold, or on some share or part thereof, subsequent to that on which the property was sold." One redemptioner may redeem from a preceding one within 60 days.²⁹⁴

In Illinois the right to redeem is given to "any judgment or decree creditor," and this provision has been so literally, and thereby so liberally, construed, as to let in a judgment creditor who had, by lapse of time, lost his lien, and whose demand against the former owner had been barred by his discharge in bankruptcy.²⁹⁵

The statutes allowing redemption mostly give to the debtor or redemptioner the choice of paying or tendering the money either to the purchaser or his representative, or to some officer pointed out by the law, who can always be found. Where the redemption money is carried to a public officer, the party wishing to redeem must at his risk pursue the statute literally. A payment to an officer not pointed out by the law, though the most appropriate for the purpose, is unavailing.²⁹⁶

a surplus, to which his lien is transferred. *Fliess v. Buckley*, 90 N. Y. 291. As to the rights acquired by a mortgagee taking in a redemption, see *Burt v. Gamble*, 98 Mich. 402, 57 N. W. 261; *Porter v. Pierce*, 120 N. Y. 217, 24 N. E. 284 (Sunday excluded from 24 hours).

²⁹⁴ The "redemptioner" must produce to the officer receiving the money written evidence of his character as such, and his affidavit. California, Code Civ. Proc. § 705. He must state his character truly. *McMillan v. Richards*, 9 Cal. 413. If the purchaser allows one not entitled to redeem, he transfers only his own rights to him. *Abadie v. Lobero*, 36 Cal. 390. Payment or redemption by the judgment debtor, no matter in what form, lets in all the liens. *McCarty v. Christie*, 13 Cal. 79. A junior mortgagee not made a party to a foreclosure suit can redeem, without reference to the statute. *Carpentier v. Brenham*, 40 Cal. 221.

²⁹⁵ *Pease v. Ritchie*, 132 Ill. 638, 24 N. E. 433. Where the execution sale is void, the redeeming creditor acquires no title. *Mullvey v. Carpenter*. 78 Ill. 580. A judgment creditor of the husband may redeem land fraudulently conveyed to his wife, and then sold as hers. *Kratz v. Buck*, 111 Ill. 47. A cotenant may redeem for all. *Calkins v. Steinbach*, 66 Cal. 117, 4 Pac. 1103.

²⁹⁶ *Maupin v. Blanton*, 93 Tenn. 422, 25 S. W. 99. The Tennessee Code (1306)

The certificate of purchase is always assignable, and so would a paid-up bid be, without a certificate. The statutes nearly everywhere allow a redemption from the purchaser or his assignee. Now, a conveyance of the land by the holder of the certificate or purchaser operates as a transfer of his bid, and of the rights held under the certificate; though the officer intrusted with the business of redemption could not be blamed or held answerable for refusing to look at anything but a formal transfer.²⁹⁷

In New York, Michigan, Wisconsin, and Minnesota, as well as in California and the states that have copied its laws, also in Indiana and Illinois, when land belonging to joint owners is sold under an execution against all, each part owner may redeem his separate interest. This is a hardship to the purchaser, but may be useful in inducing the creditor to bid a full and fair price.²⁹⁸

When redemption is by statute made applicable to judicial sales, the court cannot deprive the owner of the supposed benefit by combining land and personality in one mass; for instance, a coal mine with a large output already severed from the freehold. But, from necessity, railroads have often been sold as a whole, without granting to the defunct company or its judgment creditors any right of redemption, though not only the right of way, rails, depots, and other buildings, but the franchise also, are real estate, and generally more valuable than the rolling stock.²⁹⁹

names the clerk of the circuit court, who issues common-law executions. Yet, where land is sold by the chancery court, the money must be taken to the circuit clerk, even where the chancery clerk is appointed receiver to invest the proceeds of sale.

²⁹⁷ *Ward v. Dougherty*, 75 Cal. 240, 17 Pac. 193.

²⁹⁸ The sections to this effect are easily found among those on redemption. That for Indiana (Rev. St. § 769) is somewhat broader, but covers the ground. So, in Iowa (section 3122). See the rule applied in *Fischer v. Eslaman*, 68 Ill. 78, where the judgment creditor of one of the cotenants was allowed to redeem.

²⁹⁹ *Locey Coal Mines v. Chicago, W. & V. Coal Co.*, 131 Ill. 9, 22 N. E. 503. *Contra, Hammock v. Loan & Trust Co.*, 105 U. S. 77; *Peoria & S. R. Co. v. Thompson*, 103 Ill. 187; *Porter v. Pittsburg Bessemer Steel Co.*, 122 U. S. 267, 7 Sup. Ct. 1206; *Id.*, 120 U. S. 649, 7 Sup. Ct. 1206; *Simpson v. Castle*, 52 Cal. 644 (the former rule in that state having been changed by statute). *Contra, Settemire v. Newsome*, 10 Or. 446. In the former case, one Irwin foreclosed a lien for \$11,815 on the line of a railroad. The whole property

A sale under decree, or under execution, though subject to redemption, exhausts the lien of the writ or judgment, or of the incumbrance on which the decree is based, though it realize a much smaller sum than is called for, and though a right of redemption be reserved, and actual redemption by a "redemptioner" other than the judgment debtor himself does not restore the lien for the unsatisfied portion of the judicial demand (unless where, as in Michigan, a sale of the redemption for such unsatisfied remnant is forbidden, as oppressive).³⁰⁰

Even in those states which allow the owner to redeem from a decretal sale for debt, there is no redemption from a sale which takes the place of a partition, and of which the proceeds are to be divided among part owners. A close question might, however, arise, where the decree of sale provides in any manner for the payment of any liens or charges (other than costs) out of the proceeds; for, in the absence of appraisement and limit, and of redemption, even a small charge or lien might swallow up the whole estate. Yet, it seems that "sales by license," though the payment of debts be the object, are nowhere subject to redemption.³⁰¹

As long as the right of redemption has not expired, the defendant, in most of the states which allow redemption at all, is considered the legal owner, who can sell and convey the estate. It goes to his heirs as realty; while, if the purchaser dies before the time has run

was sold to him by the sheriff under special execution for \$500. A certificate was given to him, stating that, within a year, unless redeemed, he should have a deed. New, trustee in mortgages, paid to the clerk of court \$500, with interest at 8 per cent. The redemption, it was said by the court, was not made by the judgment debtor so as to vacate the sale; and it was adjudged that New should hold free from Irwin's decree. The case teaches a lesson to creditors buying subject to redemption at their own sales. Irwin should have bid his whole debt.

³⁰⁰ In Iowa, the sale of the right of redemption is itself redeemable. *Harrison v. Wilmering*, 72 Iowa, 727, 32 N. W. 279. And this is highly just, as the bids on both these sales together may cover but a trifling part of the value of the land. In Illinois, the right of redemption cannot be sold under execution. *Hill v. Blackwelder*, 113 Ill. 295.

³⁰¹ See *supra*, note 287, as to Kentucky. In Tennessee a sale made under decree in an administration suit is free from redemption, *Love v. Williams*, 2 Lea (Tenn.) 226; also where land bought at chancery sale is sold for non-compliance with terms of sale, *Holman v. Green*, 4 Baxt. (Tenn.) 135.

out, his interest is only a well-secured demand, and goes to the executor.³⁰²

§ 173. Levy by Extent.

In analogy to the enforcement of mortgages by "possession and lapse of time," or by strict foreclosure in equity (which is still the prevailing method in the New England states other than Rhode Island, in place of judicial sales in use elsewhere), these states also adhere to the English usage of "extending land" on execution and of "setting it off" to the creditor, with this difference, however, that, while the "elegit," or extent, under English statutes, conferred on the creditor only a temporary right of enjoyment, the laws of New England provide for vesting the creditor with a title in fee. The creditor has, however, under the modern laws of Massachusetts and Maine, the choice of ordering a sale, instead of having the land appraised and set off; while in both these states equities of redemption (that is, lands incumbered by mortgage) were always sold.³⁰³

³⁰² Simpson v. Castle, 52 Cal. 645; Rosenberg v. Croisan, 18 Or. 470, 23 Pac. 847. But see, contra, Powers v. Andrews, 84 Ala. 291, 4 South. 263. It is seen above that many statutes expressly give the right to redeem to the heir or devisee. The money may be paid to the purchaser's executor or administrator. Herndon v. Pickard, 5 Lea (Tenn.) 702 (the right of redemption may be attached, which is, in Tennessee, very different from taking on execution, as lands attached are sold by decree).

³⁰³ Massachusetts, Pub. St. c. 172, §§ 1-26. Sale, Id. §§ 27-30; redemption, Id. §§ 31-44. Sale extended by chapter 188, Laws 1874. Land free from mortgage must be described as such. Hackett v. Buck, 128 Mass. 369; Mansfield v. Dyer, 133 Mass. 374, 377. They call selling under execution "levy by sale." For Maine, see chapter 76; option to sell given in 1881 (now section 42 of that chapter). Chapter 46, § 50, gives the sale as the sole remedy against business corporations. In Connecticut, Gen. St. §§ 1182-1191, regulate levy, appraisalment, and setting off. They include mortgaged lands. Section 993 applies the law to land taken under foreign attachment. Vermont, R. L. §§ 1565-1586 (equities of redemption "set off" like other lands). New Hampshire, Pub. St. c. 233, by section 19, directs that an equity of redemption or a leasehold must be sold. A Vermont act (1884, No. 93) introduces sales unless the defendant demands by writing to that effect the old procedure. It seems that both creditor and debtor like the new method better than the old, for, in the 20 volumes of Massachusetts Reports after 141 Mass., none are reported in which questions arise over an extent, nor are there any in the Vermont Reports arising over an extent made since the act of 1884.

Estates, not only "in possession," but also in reversion or remainder, may be extended and set off³⁰⁴; but only those lands in which the defendant has a beneficial interest which he might transfer, not those in which he has but a momentary seisin (for instance, an estate upon which a mortgage for the purchase money has been given, or which the defendant has at once conveyed in accordance with a trust reposed in him).³⁰⁵ An estate held under a trust for the debtor cannot be extended, but must be reached by proceedings in equity.³⁰⁶ In Massachusetts and Maine the creditor may have even mortgaged land set off to himself on execution, if he is willing to take it at the full appraised value without deduction for the mortgage debt; and he may then contest the mortgage, if he conceive it to have been given fraudulently, or to be invalid on other grounds, or discharged.³⁰⁷ The franchise of a turnpike or like public corporation may be levied and set off (except probably in Maine).³⁰⁸

³⁰⁴ Estate of mortgagee in possession after default is not liable, *Smith v. People's Bank*, 24 Me. 185; *a fortiori*, where the mortgagee is not in possession, *Randall v. Farnham*, 36 Me. 86. *Williams v. Amory*, 14 Mass. 20; *Atkins v. Bean*, *Id.* 404; and not an estate in tail in remainder, as a tenant in tail in remainder cannot bar the entail, *Holland v. Cruft*, 3 Gray, 162. A defeasible estate may be taken, subject to defeasance. *Phillips v. Rogers*, 12 Metc. (Mass.) 405. As to land of which an unrecorded deed has been made, see *Hart v. Farmers' & Mechanics' Bank*, 33 Vt. 252. The decision in *Jewett v. Bailey*, 5 Me. 87, seems inequitable. A right to redeem from extent is liable to levy, and so successively. *Russell v. Fabyan*, 34 N. H. 218. Land fraudulently conveyed may be extended on execution against the grantor. *Russell v. Dyer*, 33 N. H. 186, and many of the cases quoted hereinafter.

³⁰⁵ *Haynes v. Jones*, 5 Metc. (Mass.) 292; *Hazleton v. Lesure*, 9 Allen, 24; *Woodward v. Sartwell*, 129 Mass. 210. The right to redeem from an absolute conveyance is not liable to levy. *Rawson v. Plaisted*, 151 Mass. 71, 23 N. E. 722. But a perfect equity, where the beneficiary is entitled to a deed, is liable to levy by Pub. St. Mass. c. 172, § 1. Unassigned dower not liable to extent, *Nason v. Allen*, 5 Me. 479; nor is a right to re-enter for condition broken, *Bangor v. Warren*, 34 Me. 324.

³⁰⁶ *Mechanics' Bank v. Williams*, 17 Pick. 438; *Staples v. Brown*, 18 Allen, 64.

³⁰⁷ *Cowles v. Dickinson*, 140 Mass. 373, 5 N. E. 302; *Pettee v. Peppard*, 125 Mass. 66 (while, as has been shown under the head of "Estoppel by Deed," a purchaser of the equity of redemption as such, the incumbrance being taken into consideration in the price, is estopped from litigating it). As to levy on land fraudulently conveyed, see, also, *Woodward v. Sartwell*, 129 Mass. 210; *Bell v. Walsh*, 130 Mass. 163.

³⁰⁸ *East Boston R. Co. v. Hubbard*, 10 Allen, 459.

Where the debtor's interest is a share held in joint tenancy, or in common, the levy must be made on such undivided share, not on a particular part of the land; but only the debtor's cotenants, not he or those claiming under him, can complain. If in a subsequent partition the share taken on execution is allotted to the debtor, such allotment inures to the creditor.³⁰⁹ A levy on the land generally, where the debtor owns only a share as tenant in common or joint tenant, is good for his share. Only his co-tenants can complain, and against them the levy and extent are of course without any force.³¹⁰ And so, where the levy embraces lands not subject to the writ, such as the debtor's homestead or a tract belonging to another, it holds whatever is subject to levy.³¹¹

Where more land is set off to the creditor than is sufficient to pay the debt, interest, and costs, and it appears thus in the return, the act of the officer is unauthorized, and no title passes.³¹² But the excess is not avoided by taxing fees or commissions in excess of the law, the debtor having his remedy against the officers for the excess.³¹³

Of several levies on different parcels, only the last is void, if the

³⁰⁹ In *Goodwin v. Gregg*, 28 Me. 188, such a levy was held voidable only at the will of the cotenants, so that, till ejected by them, the creditor could not disavow it. *Peabody v. Minot*, 24 Pick. 329; *Brown v. Bailey*, 1 Metc. (Mass.) 254; *Pickering v. Reynolds*, 111 Mass. 83; *Staniford v. Fullerton*, 18 Me. 229. See as to how a creditor fared who levied on the estate of a grantee by metes and bounds from a tenant in common, *Soutter v. Porter*, 27 Me. 405.

³¹⁰ *Baker v. Baker*, 125 Mass. 7; *Davis v. Barnard*, 60 N. H. 550; *Coos Bank v. Brooks*, 2 N. H. 148; *Pride v. Lunt*, 19 Me. 115; *Swanton v. Crooker*, 49 Me. 455. In *Hovey v. Bartlett*, 34 N. H. 278, a levy on the fee, disregarding a mortgage, was good against the equity of redemption. *Nason v. Grant*, 21 Me. 160.

³¹¹ *Virgie v. Stetson*, 77 Me. 520, 1 Atl. 481.

³¹² The appraisement or return need not add up the amount. Whether there is an excess may be found by comparing the execution and extent. *Rawson v. Clark*, 38 Me. 223; *Cutting v. Rockwood*, 2 Pick. 443 (void for excess, as in other states, a sale is void when more is raised than is called for by the writ). *Thayer v. Mayo*, 34 Me. 139, and *Glidden v. Chase*, 35 Me. 90 (excess of 52 and of 14 cents), are extreme cases. A line was drawn, in *Dwinel v. Soper*, 32 Me. 119, at 1 cent and 3 mills. In New Hampshire, the statute enables the supreme court to correct such errors by judgment against the creditor, and thus to save the title.

³¹³ *Sturdivant v. Frothingham*, 10 Me. 100.

preceding ones are sufficient to satisfy the exigency of the writ; and where one of several levies taken on the same writ is worth more than the debt, the others cannot be declared void, if it does not appear that the larger one was the first in time.³¹⁴

The levy and extent have, under the statute, the effect of a deed of conveyance by the defendant to the creditor, but of a conveyance without warranty. Such title only passes as the defendant may have at the time, but no interest which he may acquire after the appraisement.³¹⁵

The execution is not levied on land, except at the creditor's direction,³¹⁶ and should not be so levied if it can be otherwise satisfied. Under the Connecticut statute, when the defendant is absent, a demand at his last abode must be made, not only for payment, but a search for goods and chattels; otherwise, the extent on land is void.³¹⁷ Where land of sufficient value to satisfy the execution can be set off by metes and bounds, it should be done; but when the sheriff sees that this is impracticable, he levies on such a proportional undivided share of the whole as the money to be raised by the execution bears to the value of the land levied on. Such a levy has been, however, held bad, unless the return shows the cause, namely, the sheriff's inability to divide the parcel by metes and bounds.³¹⁸ There may even be a "levy by extent" subject to another levy, where it appears from the whole return that the undivided share left over by the first levy was taken up by the second.³¹⁹

³¹⁴ *Pierce v. Strickland*, 26 Me. 277; *Hathaway v. Hemingway*, 20 Conn. 191.

³¹⁵ *Freeman v. Thayer*, 33 Me. 76.

³¹⁶ *Bank of Newbury v. Baldwin*, 31 Vt. 311. The duties of a creditor in appointing an appraiser must prevent an extent without his consent.

³¹⁷ *Coe v. Wickham*, 33 Conn. 389.

³¹⁸ *Merrill v. Burbank*, 23 Me. 538 (no reason given by appraisers or officers for not laying off); *Sleeper v. Newbury Seminary*, 19 Vt. 451; *Morgan v. Armington*, 33 Vt. 13; *Edwards v. Allen*, 27 Vt. 381 (as to any levy on undivided part). For the rights of a creditor getting a share in mortgaged land, see *Young v. Williams*, 17 Conn. 393. On the other hand, to set off a part of a house is not void on its face (*Tifft v. Walker*, 10 N. H. 150); a chamber or store in house (*Buck v. Hardy*, 6 Me. 162).

³¹⁹ *Ross v. Shurtleff*, 55 Vt. 177 (a levy on 12,956 parts in 85,000 of an equity of redemption subject to another levy). Here it seems that the part levied was all that remained, probably less than the amount to be raised. In *Downing v. Sullivan*, 64 Conn. 1, 29 Atl. 130, a levy on the part that 397 bears to 220 was sustained, as of the whole estate.

The appraisement takes the part of a sale in determining the value of the land, and is therefore regarded with the closest vigilance. Of the three appraisers, who are to be disinterested, one is to be appointed by the defendant whose land is taken, one by the creditor, and the third is either chosen by the two or by the officer; and when the defendant refuses to choose an appraiser after notice, the officer appoints one for him, and all these facts must appear in the return.³²⁰ In the appraisement, not only all incumbrances, but the inchoate right of dower of the defendant's wife, should be deducted. The deduction of an incumbrance which does not in fact exist would be an injustice to the defendant, and might result in avoiding the plaintiff's title.³²¹ Yet, fraud or unfairness is not to be lightly imputed to the appraisers. For instance, if they, upon the creditor's

³²⁰ Cogswell v. Mason, 9 N. H. 48 (did not appear by whom all the appraisers were appointed); Whittier v. Varney, 10 N. H. 291. But, where plaintiff and defendant agree on the appraisers, the kinship of one of them to a party is immaterial. Durant v. Shurtleff, 49 Vt. 141. A depositor with a savings bank (plaintiff) is not disqualified. Kelley v. Barker, 63 N. H. 70; Donahue v. Coleman, 49 Conn. 464 (return must show disinterestedness). The officer cannot appoint an appraiser for the creditor. If he does, the extent is void. Richardson v. Payne, 114 Mass. 429. Where two defendants are seized, either may appoint, the other not dissenting. Herring v. Polley, 8 Mass. 113. Return that defendant neglected to appoint implies that the officer notified him. Blanchard v. Brooke, 12 Pick. 47. A reversioner may be an appraiser for the life tenant's estate. Chamberlain v. Doty, 18 Pick. 495. A cotenant cannot be (Cowdrey v. Sheldon, 122 Mass. 267); nor the inhabitant of a town which is a party (Boston v. Tileston, 11 Mass. 468). When defendant is absent, return must show he had no attorney, before officer can appoint for him. Williamson v. Wright, 75 Me. 35. For sufficient showing, to justify appointment on behalf of defendant, see Peaks v. Gifford, 78 Me. 362, 5 Atl. 879. Return showing appointment by officer because defendant is "not an inhabitant of my precinct," is bad. Brooks v. Norris, 124 Mass. 172. The signature of two appraisers, no reason being given for the absence of the third, insufficient. Taylor v. Townsend, 8 Mass. 411; Walsh v. Anderson, 135 Mass. 65 (return must show that appraisers were sworn, etc.). But, if they are justices, they may swear each other (Barnard v. Fisher, 7 Mass. 71), or be sworn by the defendant, if a justice (Id.). The return need not show that they are residents. Campbell v. Webster, 15 Gray, 28.

³²¹ In Beers v. Botsford, 13 Conn. 150, several mortgages on several parcels were apportioned by values, and deducted from each. The fixtures that are part of the freehold need not be appraised separately. Payne v. Farmers' Citizens' Nat. Bank, 29 Conn. 415.

complaint, lessen the valuation, their action may have been thoroughly honest, and should not be held null and void.³²²

Under the older law (and still, it seems, in Vermont), the levy by extent did not operate at all unless the execution with its return was, before its return day, returned into the office of the town clerk, to be there recorded; but this may now in the other states be done at any time to perfect the title, and the delay after the return day can avail only subsequent purchasers or creditors in like manner as the delay in putting an ordinary conveyance on record.³²³

According to the general principle governing plural bodies, when all the appraisers have been properly appointed (certainly when all three are present to view the land), the concurrence and signatures of two out of the three are sufficient.³²⁴

Although the New England system of "levy by extent" guards the debtor against any heavy sacrifice of his land, yet for greater security he is given time for redemption,—one year from the extent in Massachusetts, Maine, and New Hampshire; six months in Vermont; none in Connecticut. The court may extend this time in its discretion, which is done in the interest of justice when an extent is assailed by a previous creditor as collusive or fraudulent.³²⁵

When several parcels have been set off to the plaintiff upon the same execution, the defendant must redeem all or none, though they have been appraised each at a separate price.³²⁶ The redemption money is to be paid or tendered, in Vermont, to the clerk of the court from which the execution is issued. A tender to the plaintiff, not accepted, does not prevent the extent from ripening into a title. It is otherwise in the other states.³²⁷ When a tender has not been

³²² *Camp v. Bates*, 13 Conn. 1. *And de minimis non curat lex.* So, if the appraiser, after setting a price per acre, set off 26 acres and 18 square rods as 26 acres, the extent will stand. *Hathaway v. Hemingway*, 20 Conn. 191.

³²³ *Perrin v. Reed*, 33 Vt. 62; *Little v. Sleeper*, 37 Vt. 105. But the return need not mention its own recording. *Willard v. Whipple*, 40 Vt. 219. *Contra. Odiorne v. Mason*, 9 N. H. 24. A return showing a sale must still be recorded by the return day. *Riddle v. Fellows*, 42 N. H. 309.

³²⁴ *McLellan v. Nelson*, 27 Me. 129.

³²⁵ *Carroll v. McCullough*, 63 N. H. 95.

³²⁶ *Cross v. Weare*, 62 N. H. 125.

³²⁷ *Chandler v. Sawtell*, 22 Vt. 318. The statutes in Massachusetts and Maine require repayment to the creditor, not only of the extent with interest, but

accepted, it seems that the creditor's right is not thereby extinguished, as it would be under a mortgage; but when the cause comes into court, the tender must be made good by payment into court.³²⁸

While great strictness prevails in guarding the defendant against the sacrifice of his estate, yet the title under the levy is not to be lost by informalities in the return; and amendments, according to the truth, in aid of the title should be allowed at any time.³²⁹ As to the description in the act of "setting out," no technicalities are required. The boundaries of adjacent owners may be used, if they are well known.³³⁰

The acts of the sheriff and appraisers in setting off the land, "giving seisin" to the creditor (which does not imply actual possession), returning the execution, and, where necessary, having it recorded, together with the lapse of time for redemption, confer title on the creditor without any deed or other formality.³³¹ The return of the officer must show all the preceding steps fully or there is no title; while if it does show all requisite steps, the return is conclusive on all the world, and cannot be gainsaid.³³²

§ 174. Sheriffs' and Commissioners' Deeds.

The last step in the change of title which the law works out under the judgment or process of the court is a deed of conveyance made by an officer of the law, on behalf of those who were the former owners, to the person or persons on whom the law casts the title. Conveyances of this kind are a necessity under the American system of the "registry of assurances"; for the title to land which has come from a sale under execution or decree ought to be traced in the same

also of all taxes, repairs, insurance, and even improvements; and the New Hampshire law goes nearly as far. Such a tender cannot be made to a clerk.

³²⁸ Frost v. Flanders, 37 N. H. 549.

³²⁹ Avery v. Bowman, 39 N. H. 393.

³³⁰ McConihe v. Sawyer, 12 N. H. 396.

³³¹ Ladd v. Dudley, 45 N. H. 61. Equities are cut off, as by a deed for value. Bowker v. Smith, 48 N. H. 111.

³³² Ladd v. Wiggin, 35 N. H. 421; Baker v. Baker, 125 Mass. 7; Campbell v. Webster, 15 Gray, 28 (as to competency of appraisers, unless the parties agree upon facts other than those returned); Wolcott v. Ely, 2 Allen, 338.

books, or, at least, in books similar to those in which the ordinary deeds between man and man are recorded.

A sheriff's deed is given to the purchaser at execution sale when his bid has ripened into ownership,—that is, in those states, or under those circumstances, which allow no redemption, as soon as he has paid the price, in money or sale bonds, where redemption is allowed, as soon as the time for it has expired. In most states, when redemption is allowed, the purchaser receives a "certificate of purchase," in which the time is named at which the redemption runs out, and he then exchanges it for the sheriff's deed.³³³ In Kentucky, if the sale does not bring two-thirds of the appraised value, the purchaser simply waits one year, when the land becomes irredeemable and he receives his deed. In those states which have introduced the "special execution," or "mortgage execution," in place of the older mode of selling under decrees, the deed which vests the title in the buyer under judgment or decree is also a "sheriff's deed," made by the officer who conducted the sale.

The commissioner's or master's deed is, in the majority of cases, made in pursuance of an order of court which approves and confirms the sale, and orders a deed to be made to the purchaser; but it is often made to carry out a division, to enforce a decree for specific performance, or any other judgment or order which commands the transfer of land or of an interest in land from one person to another. A commissioner's or master's deed is not always made by the same officer of the court who made the sale. The court may act through one agent in finding a bidder, and through another in conveying to him the estate which he has bought, after his purchase

³³³ These certificates are assignable, and the assignee and holder is considered the "purchaser," within the meaning of the law, and receives the deed. *Turner v. First Nat. Bank*, 78 Ind. 19. The certificate, when put to record, is notice to subsequent purchasers. *Atwood v. Bearss*, 45 Mich. 469, 8 N. W. 55. In New York, Code Civ. Proc. § 1471, as amended, the sheriff must make the deed within 24 hours from the last day of redemption. It may, at the purchaser's direction, be given to a third party. *Merritt v. Jackson*, 1 Wend. 46. Where the statute permits a redemption by subsequent judgment or lien creditors, the party so redeeming is an assignee of the certificate, and the deed is made to him. See, for New York, Code Civ. Proc. §§ 1472, 1473. If redemption have been made (which may be shown even by parol), the deed is void for want of authority. *Livingston v. Arnoux*, 56 N. Y. 507.

has been confirmed,—while the deed to the purchaser at execution sale is always made by the sheriff or like officer who conducted the sale, or by a successor in the same office.

I. Sheriff's deeds. When the purchaser at an execution has paid the purchase money, obtained a confirmation (if the law requires), and the time for redemption has expired, and nothing but the execution and delivery of the deed remains to be done, he has a "perfect equity" in the land, though not yet clothed with the legal title.³³⁴ And when the deed is made and delivered, it relates back, for some purposes, to the day of sale. For instance, the purchaser may claim damages^{*} for the land, if condemned, and proceed after deed has been received; and the defendant in the execution is deprived of his estate and all power over it.³³⁵ For another purpose,—that of cutting out all intermediate transfers and incumbrances,—the sheriff's deed relates back to the time when the judgment or execution first became a lien on the land, and it will be so construed even where the literal reading of the deed would seem to carry only the title held by the defendant at its date.³³⁶

The common rule is that a sheriff who has begun the execution of a writ should carry it through to the end. Hence, when the sheriff who has sold the land has gone out of office before he is called upon to execute a deed to the purchaser, he does so nevertheless, his power continuing for that purpose.³³⁷ In some states the time for redemption is so long that the sheriff who sold will in most cases be out of office before he can convey, and several of these states have provided that the sheriff who is in office when the certificate of purchase is shown to him makes out and signs the deed.³³⁸ The

³³⁴ White v. Farley, 81 Ala. 563, 8 South. 215. In Remington v. Linthicum, 14 Pet. 84, it is said that the sale confers the title, not the sheriff's deed. But it is said in Leach v. Koenig, 55 Mo. 451, that before delivery of the deed the purchaser has no title; and, following this case, in Blodgett v. Percy, 97 Mo. 263, 10 S. W. 891, that, if he die, his administrator cannot sell.

³³⁵ Pennsylvania S. V. R. Co. v. Cleary, 125 Pa. St. 442, 17 Atl. 468; Morse v. Hackensack Sav. Bank, 47 N. J. Eq. 279, 20 Atl. 961. Where the suit begins by attachment, the deed relates back to its issual or levy. Foulk v. Colburn, 48 Mo. 228; Cowles v. Coffey, 88 N. C. 340. For New York, see Code Civ. Proc., ubi supra, for the rule in the text.

³³⁶ Owen v. Baker, 101 Mo. 407, 14 S. W. 175.

³³⁷ Hunt v. Swayze, 55 N. J. Law, 33, 25 Atl. 850.

³³⁸ Thus in Oregon, Faull v. Cooke, 19 Or. 455, 26 Pac. 662. In South Car-

execution of a sheriff's deed is a ministerial duty, and may, as such, be performed by deputy.³³⁹ But where it appears of record that the sheriff is interested in the execution, though he does not seem to have had any opportunity for abusing his authority, the deed is void.³⁴⁰

The death of the defendant after the deed is due, or after it is ordered, is not a serious obstacle, as if it were after judgment and before issue of execution, or even before sale; and it seems that, in most of the states, the sheriff may go on and execute the conveyance to the purchaser.³⁴¹ The death of the purchaser results in a deed to those upon whom his death casts the ownership of the certificate.³⁴²

The laws generally provide for the acknowledgment and the recording of a sheriff's deed. The former act may be essential to passing the title. It was so under a Missouri statute which required all such deeds to be acknowledged before and certified by the clerk of the circuit court from whose office the execution issued.³⁴³ But

olina, when the incumbent dies, the statute (section 686) empowers his successor to convey. *Carolina Savings Bank v. McMahon*, 37 S. C. 309, 16 S. E. 31. In Missouri the outgoing sheriff may transfer the pending business to his successor, who can then make the deed. *Fortune v. Fife*, 105 Mo. 433, 16 S. W. 687.

³³⁹ *Phillips v. Jamison*, 14 B. Mon. 466. The statute in some states restricts the duty to the particular deputy who conducted the sale. In New York this matter is regulated by statute (Code Civ. Proc. § 1475), which distinguishes between undersheriff and deputy.

³⁴⁰ *Morrison v. Knight*, 82 Ga. 96, 8 S. E. 211.

³⁴¹ *Insley v. U. S.*, 150 U. S. 512, 14 Sup. Ct. 158; *Thomas' Adm'r v. Thomas' Adm'x*, 87 Ky. 343, 10 S. W. 282. In Florida, where land may be sold on an execution against an administrator de bonis testatoris, the sheriff's deed may convey the interest of the decedent's estate. *Adams v. Higgins*, 23 Fla. 13, 1 South. 321.

³⁴² When the purchaser dies before the redemption has run out, the certificate is a mere lien debt, going to the administrator. But, as the deed relates back to the day of sale, it should be made to the heirs. In New York, under the Code, § 1473, it is made to the executor or administrator, in trust for the heirs, subject to the widow's dower. When there is no redemption, or when it has expired at the purchaser's death, the land goes to his heirs at

³⁴³ *Owen v. Baker*, 101 Mo. 407, 14 S. W. 175 (the circuit court clerk being recorder ex officio, his signature, with the word "recorder" added, to the acknowledgment, is good); *Sidwell v. Birney*, 69 Mo. 144.

recording the deed has no other purpose or effect than it has on private deeds, and the sheriff's deed is binding on the former owner and his heirs, or volunteers under him, though it be not put on record.³⁴⁴ We have seen in a former chapter that a sheriff's deed must, like a private deed, be delivered, but the acknowledgment before the proper official raises a presumption of delivery.³⁴⁵ It is doubtful whether, a sheriff's deed having been made, his power is not exhausted; but it is clear that a deed of correction is of no avail if made after the time which the statute limits for making the deed originally.³⁴⁶

In most of the states, the recitals appearing in the sheriff's deed as to his doings under the execution are *prima facie* evidence that these things have all been done correctly.³⁴⁷ In New York and Kentucky, it seems, the deed only proves its own execution, and thus the last step in the perfection of the title; the execution and return being necessary to establish the preceding steps.³⁴⁸

The sheriff's deed by itself, without a return of the execution, does not confer title on the purchaser.³⁴⁹

once. In some states (e. g. in Kentucky and Texas) the deed made in favor of the dead purchaser would inure to his heirs or devisees. Statutes on the subject are not uniform, and in some states wanting.

³⁴⁴ *Caldwell v. Blake*, 69 Me. 458; *Bailey v. Winn*, 101 Mo. 649, 12 S. W. 1048.

³⁴⁵ *Robisson v. Miller*, 158 Pa. St. 177, 27 Atl. 887.

³⁴⁶ *Parker v. Shannon*, 137 Ill. 376, 27 N. E. 525; *Carson v. Hughes*, 90 Mo. 173, 2 S. W. 127 (not cured by acknowledgment in open court). A deed cannot be made 15 years after the purchaser's death, to one claiming under him; and an order to that effect, made without notice to the former owner, is void. *Blodgett v. Perry*, 97 Mo. 263, 10 S. W. 891.

³⁴⁷ *Goldman v. Banta*, 58 Hun, 609, 12 N. Y. Supp. 346 (where a very old execution could not be found); *Webster v. Daniel*, 47 Ark. 131, 14 S. W. 550 (under sections 668, 3075, Mansf. Dig.); *Jordan v. Surghnor*, 107 Mo. 520, 17 S. W. 1009; *Clarke v. Miller*, 18 Barb. 269 (deed cannot be amended after delivery).

³⁴⁸ *Smith v. Moreman*, 1 T. B. Mon. 154. Here the judgment as well as the execution was required, as the proof was made against third parties. *Hasbrouck v. Burhans*, 42 Hun, 376. In Ohio, by an act of April 16, 1892, the sheriff's or master's deed is evidence of the preceding steps only when the record is destroyed by fire or riot.

³⁴⁹ *Walsh v. Anderson*, 135 Mass. 65. Yet where the return is imperfect, the recitals of the deed, in *Miller v. Miller*, 89 N. C. 402, were held to prove

The rules for describing land in a sheriff's deed do not differ from those governing deeds between man and man. But as the sale rests on the levy when the execution is general, and on the judgment when it is specific, and the sheriff has no power to convey but what he has sold; nor to sell except what he has levied on or what he was ordered to sell, a full description appearing for the first time in the sheriff's deed, when the levy or judgment had only a vague and defective description, does no good.³⁵⁰

On the other hand, if the sheriff's deed conveys a smaller interest than that which the proceedings on which it is based justify, it is construed, nevertheless, as covering all the estate which the sheriff sold, and it will be assumed, unless the sale notice shows the contrary, that he sold all which, under the levy or the judgment, he was bound or ordered to sell.³⁵¹

Small informalities in the recitals of the deed, as well as trifling inaccuracies in describing the judgment or execution, do not defeat the deed, and do not exclude it as evidence.³⁵²

the sale. In *Holman v. Gill*, 107 Ill. 467, these recitals and the description were allowed to cure a defective return, and a misdescription in the certificate of purchase. A recital of a confirmation, which in fact was never had, is of no avail. *Morrell v. Ingle*, 23 Kan. 32.

³⁵⁰ *Stetson v. Freeman*, 35 Kan. 523, 11 Pac. 431; *Allday v. Whitaker*, 66 Tex. 669, 1 S. W. 794 (and see chapter 2, § 6); *Pfliffer v. Lindsay*, 66 Tex. 123, 1 S. W. 264. A description good at the time of levy is sufficient. *Stewart v. Perkins*, 110 Mo. 660, 19 S. W. 989. A vague description may be cured by long acquiescence. *Logan's Heirs v. Pierce*, 66 Tex. 126, 18 S. W. 343.

³⁵¹ *Owen v. Baker*, supra; *Carolina Sav. Bank v. McMahon*, supra (words of inheritance supplied); *Dwyer v. Rippetoe*, 72 Tex. 520, 534, 10 S. W. 668 (in deeds under sale to enforce vendor's lien, words restricting the interest sold are rejected).

³⁵² *Owen v. Baker*, supra, note 332 (where the execution against three defendants was described as ordering the money to be made from the estate of the defendant); *Lewis v. Morrow*, 89 Mo. 174, 1 S. W. 93 (day of judgment misstated). Facts not stated in the deed may be shown from the execution and return. *Hall v. Klepzig*, 99 Mo. 83, 12 S. W. 372. Of course, where the recitals show that the sheriff has acted with doubtful legality, the court must pass on these acts,—for instance, whether a sale of several lots in lump is valid, *Hays v. Perkins*, 109 Mo. 102, 18 S. W. 1127. Whether selling the surety's land before that of the principal is lawful, *Brackenridge v. Cobb*, 85 Tex. 448, 21 S. W. 1034. The execution must be identified, but this may be done informally. *McGuire v. Kouns*, 7 T. B. Mon. 387.

If a sheriff's deed comprises land which the officer had no power to sell, it is void as to such land (for instance, as to the debtor's homestead); but, like a private deed, it would pass the title to other land comprised in it, and which the officer had the power to sell and convey: "utile per inutile non vitiatur."³⁵³

Where the law interposes a certificate of sale between sale and deed, this ought to be spread on record before the time when the right of redemption expires. To withhold it from the record may be a badge of unfairness or trickery.³⁵⁴

The sheriff's deed being the last act in clothing the purchaser with a title, a new cause of action arises from its execution and delivery to the execution defendant whose land has been unfairly or improperly sold. At least, counting from the delivery of the deed, there ought to be no laches when the sale recited in the deed is to be set aside for gross inadequacy of price or similar grounds.³⁵⁵

II. Deeds by "masters," or commissioners of the court, differ but little from deeds by sheriffs. In some states, as in South Carolina, the master needs no special direction from the court which orders him to sell, for making a deed to the purchaser, this being implied in the authority to sell. In Kentucky, on the other hand, even the confirmation of the report of sale does not confer power to make a deed, but a separate order to convey is added for that purpose.³⁵⁶

³⁵³ Semmes v. Wheatley (Miss.) 7 South. 430.

³⁵⁴ Parker v. Shannon, 137 Ill. 376, 27 N. E. 525. The court, in a case of trickery and resulting sacrifice, will scan the proceedings closely for irregularities. *Id.* But see Caldwell v. Blake, *supra*, where the failure to return the execution for one year was not induced by an intent to conceal.

³⁵⁵ Brackenridge v. Cobb, 85 Tex. 448, 21 S. W. 1034.

³⁵⁶ Peake v. Young, 40 S. C. 41, 18 S. E. 237. In Kentucky, before the act of May 31, 1865, the "judgment" for conveyance had to be revived, if before deed made either the defendant owner or the purchaser died. Under that act, the deed is made ignoring the death of either party, but an order which confirms the sale without in so many words directing a deed does not authorize its execution. Gill v. Hewitt, 7 Bush (Ky.) 10, 15. In form, the sheriff's deed and master's deed differ in this: That the sheriff, after reciting the execution and sale, etc., proceeds, "Therefore, I, T. S., sheriff, etc., do hereby grant, etc., and convey, etc.;" while a master's deed generally begins as an indenture between A. B., C. D., etc. (all the parties to the suit in which the decree is rendered, whose rights are affected by it), all by J. S., master in chancery, of the first part, and E. T. (the purchaser, or other party

The master or commissioner who, under the orders of the court, conveys land to a party or purchaser, being a mere instrument or mouthpiece of the court, his deed must always be reported to the court and confirmed by it. It has no validity without such confirmation, and is, at last, the act of the court rather than that of the officer.³⁵⁷

Whether the deed made to the purchaser at a decretal sale be called a sheriff's or a commissioner's deed, it has the same effect,—that of transferring to the purchaser the title of all parties to the cause, plaintiffs as well as defendants, such as they had at the sale or before it, since the commencement of the suit.³⁵⁸

It is not usual, upon the appointment of a new trustee, in place of a former trustee who has died, declined, or resigned, or has been removed, to transfer to him the legal title by a master's or commissioner's deed. It is clearly not necessary where the statute, as in New York or Massachusetts, expressly empowers the court to appoint (the statute itself confers the estate and all incident powers on the new trustee); nor when the instrument raising the trust provides for a successor. But modern practice dispenses with such a deed in all cases.³⁵⁹

to whom the deed is ordered), of the second part, and after reciting so much of the proceedings and judgment or decree as must be shown to justify the sale, together with the sale itself, and the compliance with its terms and order of confirmation and for a conveyance, proceeds, "That the parties of the first part convey, etc.;" and thus down to the testimonium clause and signature. The master acts as the attorney in fact whom the law and the decree of the court have imposed upon the parties. In Maryland the persons appointed to carry out a decree are called "trustees"; in Alabama the register of the chancery court makes^s the deed.

³⁵⁷ The practice acts or codes of procedure always provide for the approval of the master's, commissioner's, or referee's deed. Held to be necessary under the old practice in *Dickerson v. Talbot*, 14 B. Mon. 60.

³⁵⁸ *Young v. Brand*, 15 Neb. 601, 19 N. W. 494 (including a tax lien which the plaintiff may have bought up before the sale).

³⁵⁹ *Perry, Trusts*, § 284; *Lewin, Trusts*, c. 25, pl. 8. The latter (8th Ed.) sums up the English authorities thus: "It would appear, therefore, that at the present day an actual conveyance of the legal estate, unless the power be specially worded, is not essential to the valid appointment of new trustees." It has been deemed needless in several American cases, as *Parker v. Converse*, 5 Gray, 341, *Burdick v. Goddard*, 11 R. I. 516; *Wooldridge v. Planters' Bank*, 1 Sneed (Tenn.) 297; *Goss v. Singleton*, 2 Head (Tenn.) 67; *Duffy*

Note on Tax Titles.

It would be a useless attempt to treat, in one chapter of this work, the subject of "Tax Titles," considering that two stout volumes have not been considered too much by Mr. Blackwell, and the recent work of Judge H. C. Black is hardly less bulky. We can only here point out the lines along which one who examines the validity of a tax title must travel. The sale of land for taxes is a purely American institution. The property tax, which is mainly laid on lands and improvements, gives, in the United States, for states, counties, and cities, the chief source of revenue, while municipal bodies in Great Britain and Germany derive their main income from the rates or from the Miethsteuer, a tax levied upon the rental value of lands and houses actually occupied, and generally paid by the occupier, without reference to ownership.

During the Middle Ages, land in all parts of Western Europe contributed its share to the support of the state, through the feudal services and burdens which the king's tenants owed him. The long Parliament, when at war with King Charles, naturally abolished all the burdens and incidents of feudal tenure, and its work was ratified at the Restoration in 1660. The landed gentry who controlled both houses of parliament selfishly indemnified the government by substituting the excise, which the whole people had to pay, for a revenue which the king had derived from the incidents of knight's service; and thus the lands of England (with the exception of very few small subsidies) remained free from all contributions to the state till 1692, when the exigencies of the war with France required the imposition of a land tax. Only one assessment was made, once for all. The tax thus, though varying in rate, became a light quit-rent; and in our days wholly insignificant in those districts which, then rural, have since become urban, as the old tax is still paid upon lands of a hundred fold greater value; but this mode of raising revenue, now so unimportant in England, was transplanted to the colonies, where it became the main reliance for the support of the public service. For this purpose an entirely new feature had to be added, namely a new rating of the land from time to time, as its value increased, either by improvement or through the increase of population. Thus, alone, the tax levied at the beginning of the century could bear any just proportion to the needs of the country at its end. The Virginia revenue laws of colonial times are to a great extent copied from the English land-tax law, in some of its later re-enactments. The leading common feature is the method

v. Calvert, 6 Gill. (Md.) 487 (under the statute); Ellis v. Boston, H. & E. R. R., 107 Mass. 13; Webster Bank v. Eldridge, 115 Mass. 424 (under the words creating the trust). In some older American cases (Foster v. Goree, 4 Ala. 440; Crosby v. Huston, 1 Tex. 203), a deed to the new trustee was thought to be essential. In Coleman-Bush Inv. Co. v. Figg, 95 Ky. 403, 25 S. W. 888, without a statute, and without the word "successor" in the creation of the trust, a conveyance was thought unnecessary.

of collecting the tax from delinquents by distress, which is simply the feudal remedy for the collection of rents. The English land-tax act did not contemplate that the owner assessed for the tax would occupy all the parcels, or that the distrainable goods on the land would generally belong to him. On the contrary, it was supposed that in most cases these goods would belong to his tenants; and the law therefore gave to these tenants an ample indemnity against the sums which they might have to pay by force of distress, in authorizing them to hold the land free of rent, until the delinquent landlord would reimburse them for the tax paid by them; and these provisions of the English acts were faithfully reproduced by the Virginia revenue law of 1748, and in Kentucky as late as 1799, and again in 1831.

But for two reasons this sensible method of collecting the taxes on land by distress fell into neglect, in many states actually into disuse: First and foremost, because wild lands were bought or received as bounty, in large tracts, by nonresident owners, and there was nothing on the land to distrain; secondly, and this cause is still greatly at work, because the sheriff or other collecting officer, elected by the people, either disliked to incur the odium of distraining for tax, or shirked the labor or loss of time of running after the few taxpayers who failed to come voluntarily to his office with their contributions. And thus a necessity arose for that clumsy system of selling the land assessed for the tax levied upon it, with all its train of hardship, chicanery, and oppression on the one hand, and its many loopholes for escape on the other; its brood of "land sharks," and a crop of litigation more embittered than on any other one branch of the law.

Pennsylvania formerly discriminated so far between "seated" and unseated land that there was a lien for the tax upon the latter, but none for the former; but this very wise distinction has been long since abandoned. A healthy diminution of tax titles will, however, be brought about by provisions in the tax law that land cannot be sold whenever sufficient personalty can be found out of which to make the tax bill by distress, at least when such provisions are carried out faithfully, as was done by the court of appeals of Kentucky in 1894, in the case of *Com. v. Three Forks Coal Co.*, 95 Ky. 273, 25 S. W. 3, where, in an action upon the certificate, the sale of the land was held void upon proof that there was sufficient personalty within reach at the time of the levy. In Indiana (Rev. St. § 6457) lands are not placed on the delinquent list when the owner is assessed for more personalty than the tax on the lands amounts to.

I. Formerly the sales for taxes were always ministerial, and such they are yet in most of the states; that is, without any other authority than what proceeds from those assessing the tax, or some other clerical officer, whether in the form of a warrant, attached to the tax roll, or a mere tax bill. Without any order or judgment of a court, the collector, treasurer, or sheriff advertises the land, and sells it at auction; or, rather, he pretends to sell it; for, as the sale is subject to redemption, no one ever offers (unless there is an agreement with some of the owners for an ulterior purpose) anything like the value of the property,—never more than the amount of the tax due, with interest or penalty and costs

of sale,—and, as the law generally forbids the acceptance of a lower bid, no one offers less.

The time for redemption having expired, the purchaser or his assignee (the certificates given at the sale being assignable) gets his deed, in some states from the collector, in some from the auditor or other official representing the state. When, armed with this deed, he seeks to obtain or defend the possession of the land, he finds (unless the statute comes to his aid with presumptions in his favor) he must show affirmatively that all steps from the beginning to the end, from the imposition of the tax to the completion of the title in the buyer, have been properly taken. *Smith v. Ryan*, 88 Ky. 636, 11 S. W. 647. The first essential is a law levying the tax on such property as his; that is, directing a certain number of cents or mills to be paid for each dollar or each one hundred dollars in value of lands or improvements (or, in the case of special assessments, so much per acre or per front foot or square foot, to be ascertained in a prescribed way). Now, in the case of state taxes this is easy enough; for the courts must take judicial notice of the act of the legislature which levies the tax. Of course the state law may be unconstitutional, and often is, under the very precise organic laws that have been adopted during the second half of the nineteenth century. But when the tax is levied by the board of commissioners of a county, the council of a city, the inhabitants of a town assembled in town meeting, or any other body subordinate to the state legislature, and deriving its powers from it, this step, in tracing the authority for the tax deed from its source, may be the most difficult. The court cannot take judicial notice of a city ordinance, or of the vote of a town meeting. It must be proved. And, when the proceedings are shown up, there are many unexpected defects, which may render them void; such as a flaw in the warrant for the meeting or the lack of a quorum; the lack of the time required by law between the passage in one and the other board of a bicameral council; the failure to publish an ordinance, or to publish it at the proper time, or in the proper paper, when the state law, as often it does, makes the validity of an ordinance to depend upon a previous publication. But, when the ordinance or vote has been passed in due form, the further question arises, is it authorized by the general law, governing cities or towns, or by the charter of the particular city or village?—a question of law merely, but not always clear; for instance, when the local lawgivers have undertaken to exempt some of the property which they ought to tax, an attempt which may result in rendering their whole action void. See *Weeks v. Milwaukee*, 10 Wis. 242, 263, and other cases growing out of the attempted exemption of the Newell House, at Milwaukee.

But, second, after the valid levy or imposition of the tax, there must be a valid assessment; that is, the land and improvements liable to the tax must be valued by the official pointed out by the law for that purpose. A *de facto* officer's acts are valid; but there can be no *de facto* office; and nice questions often arise, whether the land was valued by one who filled the right office, as, in the frequent change of statutes, errors will often occur. And the oath which

the assessor takes to value all property truly is something more than an oath of office; its omission is a defect of the gravest kind. *Martin v. Barbour*, 140 U. S. 634, 11 Sup. Ct. 944. Again, there is a part of the machinery of assessment, known as "appeals and reviews," which many courts deem indispensable (although the supreme court of the United States does not: *McMillen v. Anderson*, 95 U. S. 37), under the clause of the fourteenth amendment, which declares that no one shall be deprived of his property "without due process of law"; and when a taxpayer has not had the opportunity of being heard in remonstrance against the valuation made by the assessor, and has not had this opportunity exactly in the mode provided for by law, the assessment has often been declared void. In *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 4 Sup. Ct. 663, the statutes and decisions of many of the states on the necessity of "appeal or review" are collated. In *Ormsby v. City of Louisville*, 79 Ky. 197, an assessment was, in a suit for the tax itself, held void for a slight error in the notice of the sittings of the board of review addressed to the assessed land-owners. See, also, *Jewell v. Van Steenburgh*, 58 N. Y. 86. Again, where the assessment has been made by the proper officer, and at the right time, the tax resulting is not binding till it is entered upon the assessment books in the prescribed form. Some of the points arising on the form of entry on those books, such as the dollar mark before the number of dollars, the mode of describing the assessed lot, are discussed in the last-named case.

But the tax may be lawfully imposed, and the land may have been properly assessed and yet the tax bill is not due, because the land is exempt. We do not here refer to the property of charities or churches, or any that is exempted on like grounds, but to the millions of acres that are taken into cultivation every year on which the title of the United States has not been extinguished. The late case of *American Inv. Co. v. Beadle Co.* (S. D.) 59 N. W. 212, shows the dangers in this line, for here a grant apparently issued was recalled by the government as unauthorized years after the land had been assessed and had been sold for taxes. How jealous the United States are about allowing land to which they hold even a shadowy title to be taxed by a state was shown in *Van Brocklin v. Anderson*, 117 U. S. 151, 6 Sup. Ct. 670. See, also, the cases cited in the section on "Railroad Land Grants." However, when the purchaser, in the wider sense, of any part of the public domain has done everything on his part to earn the title, when his equities are complete and the patent is only withheld either by his delay in asking for it or the remissness of the officials in making it out, the land may be assessed to the owner, and his equitable estate may be sold. See *Carroll v. Soffard*, 3 How. 461. *Secus* where something remains to be done before the patent is due. *Wisconsin Cent. R. Co. v. Price Co.*, 133 U. S. 497, 10 Sup. Ct. 341.

For a "special assessment," or, as it is called in the Eastern states, an "assessment for benefits," imposed on behalf of a city, town, village, or a reclamation or drainage district, the apportionment among the abutters or parties otherwise chargeable must be preceded by an acceptance and approval of the work,

and this, again, by a notice, enabling the parties to object, either personal, through the newspapers, or by posters. In such a notice there is an abundant room for missteps. Or, where the charter has been changed between the ordering and acceptance of the work, it may be a matter for doubt who is the right and proper official to inspect and pass on the work, and an error herein is clearly fatal. Thus, it was held in *Buckman v. Cuneo*, 103 Cal. 64, 36 Pac. 1025, that, where the engineer's certificate of work done in grading a street must be recorded to make the assessment therefor a lien, the diagram indorsed upon the report must also be recorded; otherwise, the lien does not attach. Whether the constitutional guaranty of "due process of law" requires an opportunity to be given to the abutter to contest the sufficiency of the work at some stage of the proceeding was held in the negative in *Alberger v. Mayor, etc., of City of Baltimore*, 64 Md. 1, 20 Atl. 988; in the affirmative in *Ulman v. Mayor, etc., of City of Baltimore*, 72 Md. 587, 20 Atl. 141, and 21 Atl. 709. When "benefits" or special assessments are collected by chancery suit, as in Ohio, Illinois, and Kentucky, the sale is judicial, and cannot be collaterally assailed for errors preceding the suit; but when the apportionment is enforced, as in many other states, by ministerial sale, and the apportionment has been made upon wrong principles, and throws too large a proportion upon any one lot, the sale of that lot is necessarily void.

Returning, now, to taxes in general, let us assume that we have a valid levy and a lawful valuation, with opportunity for review, spread in due form upon the assessment book. We need next, to support a ministerial sale:

Third, after the "levy" and "assessment" of the tax, there must be a "warrant" from the assessor to the officer (sheriff, treasurer, collector) who is empowered to sell. This warrant may consist simply in turning over the assessment books or a certified copy thereof to the collecting officer; it may be a formal document under the seal of the state, covering the whole "grand list"; it may be a separate bill made out and signed by the assessor for each taxpayer or for each lot. But whatever the statute says concerning it must be done before any seizure or sale of either goods or lands can be had, just as no levy can be made under a judgment without a writ of fieri facias or like process; and there must not only be a warrant, but it must be such as the law prescribes. *Waite v. Hyde Park Lumber Co.*, 65 Vt. 103, 25 Atl. 1089; *Pearson v. Canney*, 64 Me. 188.

The man who issues this warrant, and the man who receives it and acts upon it, must be an officer, or at least a de facto officer, when and while he does so; and here, again, is room for many slips, and for a great deal of learning. Thus, where the collector's office is generally connected with that of sheriff, but is not the same, a deputy sheriff is not even a de facto collector, and his acts are invalid. *Crowell v. Barham*, 57 Ark. 195, 21 S. W. 33. The warrant having been rightly issued, the time must fully expire which the statute allows, and if a demand of the money is directed by it, such a demand is a condition precedent; and again, as stated above, the sale of land may be made

to depend upon the nonexistence of distrainable goods, or at least upon the inability of the officer to find such goods after the use of due diligence. On the fatal results of a premature sale, rendering the tax deed void on its very face, we shall have occasion again to quote *Moore v. Brown*, 11 How. 414.

Fourth. We come now to the most important step. The collecting or selling officer, for often the law separates the two functions, has a valid tax, properly assessed. The warrant has been issued. The delinquent has, where it is necessary, been warned by demand. There is no distress where its absence is a prerequisite. He must now advertise and sell. The mode of advertisement is prescribed by statute, and must be narrowly pursued. The description in the notice must be such as to identify the property. (For degree of certainty, see below, under head of "Sale.") The notice must generally state the amount to be raised, including the tax in arrear, interest or penalty for the default, the cost of advertising, and the commission for the sale, and of course the time and place for holding the sale, which time and place must be such as the law prescribes and must be faithfully observed. The sale is carried on by auction, though in the vast majority of cases, there is but one bid, and that for the exact amount to be raised. If no one else bids so much, the state, or city, or other political body to whom the tax is due bids in the property. In most states a better bid than this must take the shape of buying less than the whole parcel for the amount to be raised (see Iowa St. § 876), for to pay more for the land than the tax, interest, and costs would show that the officer had exceeded his authority, and render the sale void. In some states, however, as in Pennsylvania and in Massachusetts (see the case of *Reed v. Crapo*, 127 Mass. 391, cited elsewhere as an example), a sale for a greater sum is authorized in certain cases, and a provision is made for a "surplus bond," or for paying the surplus to the owner.

As a sale of more property than needful is unauthorized, and as the law shuts its eye to the well-known circumstance that the whole parcel would in almost every case be knocked off, as well for a smaller as for a larger sum, it follows that an error in computation made against the delinquent, or when the sale is made jointly for several tax bills an illegal item in any one of them, vacates the sale of the lot in toto (*Gage v. Pumpelly*, 115 U. S. 454, 6 Sup. Ct. 136, coming up from Illinois, where the sale is under a sort of execution under a judgment); a fortiori, where the sale is ministerial.

Another objection arises when several lots are sold together, of which each one should be assessed, advertised, and sold separately, and it is often a matter of taste to determine what are separate lots. And while common sense would dictate the selling of one lot to pay all taxes which the same delinquent owes on all his property, and such a course would be most for his benefit, by giving him an unencumbered title to all the rest, yet the technicalities of tax law will not permit such a course, for third parties might have acquired an interest in the lot sold and should not be called upon to redeem it from more than its own burdens. A sale of a tract composed of several parcels was held good

in *Slater v. Maxwell*, 6 Wall. 269, because no bid could be obtained for less. To sell one acre to raise the tax on one square mile would seem highly just and fair, but was deemed irregular in *Ballance v. Forsyth*, 13 How. 18.

Fifth. The sale having been made, and the so-called highest bidder having paid the price, he generally gets a "certificate of purchase" from the selling officer stating the material facts, including the name of the assessed owner, a description of the property, the name of the purchaser, the price paid, and the date of the sale. This last is very important, for from that date the time for redemption is counted. Here, again, the statutes of the several states diverge very widely—First in the length of time given for redemption (aside from Nebraska, where the certificate is only a lien, to be enforced like a mortgage by suit in equity. See *Alexander v. Shaffer*, 38 Neb. 812, 57 N. W. 541), which ranges from one year to five, and which in some states does not, in others does, run against infants; next, in the rate of interest. When the time for redemption has expired, some states do, while others do not, require a notice to be given to the owner by way of a last warning; and those which require the notice differ again in the methods for serving it. Where the affidavit as to serving the notice must, under the law, be made by the purchaser, his agent, or attorney, the deed is unauthorized where the affidavit made by a person other than the purchaser does not show him to be such agent or attorney. *Stevens v. Murphy* (Iowa) 59 N. W. 203.

Sixth, and last, comes the tax deed, which invests the purchaser with the title to the tract sold. But, what sort of a title? Two decisions of recent date—*Merriam v. Goodlett*, 36 Neb. 384, 54 N. W. 686, and *McDonald v. Hannah*. S C. C. A. 426, 59 Fed. 977, coming up under the laws of Washington, or *Baer v. Choir*, 7 Wash. 631, 32 Pac. 776, and 36 Pac. 286—are diametrically opposed. In Nebraska, the lien of the certificate covers "the land," irrespective of ownership, and, when foreclosed, overreaches all other claims; while in Washington, where the tax is treated as a personal debt, and collected by distraint, and the land is only sold as a last resort, the purchaser gets only the title of the party in whose name the land is listed, and against whom the proceeding which ends in the sale has been carried on. In some states,—for instance, in Vermont under section 389 of the Revised Laws,—"the warrant may be extended on any land in the state" (or in the county) "owned by such person" (the delinquent); in other words, the warrant or tax bill has no greater force than an execution, and is levied only on the delinquent's interest. We have shown elsewhere that in New York the tax purchaser must, after receiving his deed, give to those who hold recorded mortgages notice to enable them to redeem within six months.

The deed must in every respect follow the statute, or it conveys no title. The seal of the officer cannot be dispensed with. The description must identify the land, and must do so perhaps with greater certainty than an ordinary deed or the return of a levy on an execution; for equities are not indulged in for the benefit of those "who buy acres for cents, and pay dollars instead of

thousands." Cutting off a named quantity at one end ought to be sufficient, and was held to be so in *Herring v. Moses*, 71 Miss. 620, 14 South. 437, but insufficient in *Roth v. Gabbert*, 123 Mo. 21, 27 S. W. 528. Whatever recitals the statute requires the deed to contain must be inserted. *Burden v. Taylor*, 124 Mo. 12, 27 Mo. 349. And yet unless that statute speaks out plainly to the contrary effect, the deed proves nothing but its own execution and delivery. The facts recited must be proved dehors, whenever they are brought into issue. See, *infra*, the remarks quoted from Cooley's Constitutional Limitations, on statutes which make the deed either *prima facie* or conclusive proof.

In some states the tax deed does not confer any title until it is recorded, which means, of course, lawfully recorded, and opens up another door for slips; in some states, until it is confirmed by the court. *Neal v. Wideman*, 59 Ark. 5, 26 S. W. 16.

Seventh. Besides the direct line of levy, assessment, warrant, advertisement, and sale, certificate and time for redemption, and the final deed delivered and placed on record, there are pitfalls all along the road. Thus, if any of the officers who carry on the proceedings has a personal interest, this generally vitiates his action, especially when the officer who sells is interested in the bid. His bid remains invalid, though it be assigned to a third party as soon as he finds his mistake. *Straus v. Head* (Ky.), 21 S. W. 537. To guard against oppression and abuse, the statute of West Virginia requires the sheriff to append an affidavit to his report of tax sales to this purport: "I am not now, nor have I at any time, been directly or indirectly interested in the purchase." And it was held in *Baxter v. Wade*, 39 W. Va. 281, 19 S. E. 404, that the omission of the words, "Nor have I at any time been," from the affidavit was fatal, at least upon an objection before the deed was made. Numberless cases will be found in Blackwell or Black where mistakes no worse than this discovered after deed made, vitiated the title. Or an excuse by affidavit for not giving the final notice to redeem may be insufficient, on grounds which in any other branch of the law would be deemed flimsy. *Glos v. Sankey*, 148 Ill. 536, 36 N. E. 628.

When the state or county becomes the highest bidder at a tax sale, it holds its title under the same tests as to compliance with the law governing levy, assessment, and sale as a private bidder, and it can give no better title than it obtains. *Pine Co. v. Lambert* (Minn.) 58 N. W. 990; *Bennett v. Chaffe*, 69 Miss. 279, 13 South. 731; *Martin v. Barbour* (from Arkansas) 140 U. S. 634, 11 Sup. Ct. 944. The legislature may, when it finds that the old sales at which the state became the highest bidder were ineffectual, direct that the same lands may again be put up for sale, and may take care that greater caution be exercised the next time. Sales of these so-called "forfeited lands" are quite common in Mississippi. In Kentucky the auditor's agent used to sell the lands "bought by the state"; but in such a proceeding he could, of course, give to the purchaser no better title than that which the state had acquired. Any attempt to bring about such a result, as was made by

the auditor's agent acts passed in Kentucky in 1878 and 1880, is illogical to the verge of childishness.

It is impossible to give precise rules showing what errors or defects along this long route vitiate the tax deed, and which are venial. Courts have often been swayed by other considerations than those of strict technical law; for instance, the great value of the land in proportion to the tax; the owner's weakness of mind; the accident which caused him to overlook the tax bill; the rapacity of the buyer, though not cropping out in any unfair trick. But it is admitted that those provisions of the law, which have not been enacted for the benefit of the taxpayer, but for that of the government, such as a clause requiring the collector to give bond to account for his collections, or to receipt to the assessor for the bills placed in his hands, may be neglected without affecting either the validity of the tax or of the tax title; while those provisions which are for the taxpayer's benefit (e. g. the notice that he may have an appeal, a previous demand before advertising the sale, the proper length of advertisement, the notice that a deed will be applied for), being made to shield him against surprise or oppression, must always be substantially complied with, or the title fails. What is a substantial compliance, is, of course, a very hard question, discussed in thousands of cases. Mr. Blackwell, in an early edition, said that out of 2,000 reported cases which he digested not 2 per cent. had successfully passed the ordeal that all the steps were substantially correct; in other words, only 2 per cent. of the tax titles were good. Few states have left the subject of tax titles in the shape above described. Vermont is one of them, and it may be said with some assurance that a tax title in that state is as much as worthless.

II. But this remark is hardly true when applied to tax deeds issued within the last 15 or 20 years. Before considering those sales which are based upon the prior judgment of a court, and confirmed by a subsequent order, standing thus on the higher plane of judicial sanction, we find a great deal of modern legislation to cure errors in ministerial sales. The first and smallest favor that can be shown to the holder of the tax deed is a provision that its recitals shall be *prima facie* proof of the facts therein stated, or the execution of the tax deed may itself be deemed a recital that all the steps were properly taken, and as such be made *prima facie* proof to that effect, as by the Mississippi Code, § 1806. An act making the deed evidence is understood as making it *prima facie* evidence. *Parker v. Overman*, 18 How. 137. There can be no question as to the right of a legislature to prescribe evidence. But when the recitals of the deed, or some of them, are made conclusive evidence, room is at once given for grave constitutional objections; for to say so means neither more nor less than that a man who owns a piece of land by justice and right is deprived of it because a public officer chooses to write down an untruth in an official deed, and confirm it by his hand and seal. Modern tax laws, which seek to give security to

the deed, have generally discriminated between those facts as to which the recitals of the deed shall be conclusive and those of which they shall only be *prima facie* proof. It would be simpler to say that the former facts shall not be essential to the passing of the title. Thus the Kentucky revenue act of 1886 directs: "As between the purchaser [even before he gets his deed] and the former owner of the property it shall be conclusively presumed that all the steps necessary to pass a good title have been duly and regularly taken, except that the former owner may show by pleading and proof: (1) That the land was never assessed; and in order to show this, it will not be sufficient to show, that the assessment was defective merely. (2) That the property was not subject to taxation at the time of such assessment. (3) That the taxes were paid before the sale." Another clause of the law makes the sheriff liable on his official bond for the loss of property arising from his failure to do his duty; but this clause has not been tested, and is not likely to be of any use. Mr. Cooley says of these laws for the upholding of tax titles, in his great work on Constitutional Limitations (6th Ed., pp. 451-453): "A strong instance in illustration of legislative control over evidence will be found in the laws of some of the states in regard to conveyances of lands upon sales to satisfy delinquent taxes. Independent of special statutory rules on the subject, such conveyances would not be evidence of title. They are executed under a statutory power, and it devolves upon the claimant under them to show that the successive steps which, under the statute, lead to such conveyance, have been taken. But it cannot be doubted that the rule may be so changed as to make a tax deed *prima facie* evidence that all the proceedings have been regular, and that the purchaser has acquired under them a good title." And he adds that, as far as the statute only affects the evidence, it may be retrospective, —that is, it may direct that deeds made before its enactment shall be evidence of all or any of the steps leading to the conveyance; citing for this opinion *Webb v. Den*, 17 How. 576 (which is under a law making ancient records of deeds proof that the deeds were rightfully admitted to probate). He proceeds: "But there are fixed bounds to the power of the legislature over the subject, which cannot be exceeded. * * * It has not power to establish rules which, under pretense of regulating the presentation of evidence, go so far as altogether to exclude a party from exhibiting his rights. Except in those cases which fall within the familiar doctrine of estoppel at the common law, or rest upon like reasons, it would not, we apprehend, be in the power of the legislature to declare that a particular item of evidence shall preclude a party from establishing his rights in opposition to it. In judicial investigations 'the law of the land' requires an opportunity for a trial, and there can be no trial if only one party is suffered to produce his proofs. * * * A statute, therefore, which should make a tax deed conclusive evidence of a complete title, and preclude the owner of the original title from showing its invalidity, would be void, because being not

a law regulating evidence, but an unconstitutional confiscation of property." After citing in support of these straightforward and manly views the cases of *Groesbeck v. Seeley*, 13 Mich. 329; *White v. Flynn*, 23 Ind. 46; *Corbin v. Hill*, 21 Iowa, 75; *Abbott v. Lindenbower*, 46 Mo. 292; *Dingey v. Paxton*, 60 Miss. 1038; *Railroad Co. v. Payne*, 33 Ark. 816; and *Wright v. Cradlebaugh*, 3 Nev. 310,—from which he quotes freely, he admits that the legislature may make the deed conclusive "as to matters not essential and jurisdictional" (without, however, defining which are and which are not), and he quotes a later New York case (*People v. Turner*, 117 N. Y. 227, 22 N. E. 1022) for the validity of a provision that six months after the passage of the act certain tax deeds made on past sales should be conclusive evidence. But the decision was put upon the ground that the law was somewhat in the nature of a statute of limitation, for any one seeking to raise defects in the tax proceedings, which the act would cure, might do so by stirring the contention within the six months allowed for that purpose. Upon the same ground, a New York act, with reference to certificates held by tax buyers in Brooklyn, which deprived them of the right to conveyance unless they should apply within six months, was sustained in *Wheeler v. Jackson*, 137 U. S. 245, 11 Sup. Ct. 76. In the very late case of *Roth v. Gabbert*, 123 Mo. 26, 27 S. W. 528, section 1372 of the Revised Statutes of 1889, under which the tax deed is conclusive proof that the property was duly advertised for sale, was held void, as depriving the owner of his land without due process of law; while in *Larson v. Dickey*, 39 Neb. 463, 58 N. W. 167, the distinction is taken: a legislature may make the deed conclusive as to compliance with all demands of the law which are directory only, and which pertain to the regulation of the taxing power, and might have been dispensed with in the first instance; but not as to a jurisdictional fact, indispensable to the power of taxation and sale. The phraseology quoted above from the Kentucky act of 1886, though highly illogical, is by no means uncommon, as far as such a law is prospective; that is, when it has been passed before any of the steps prescribed should have been taken, or before any of the irregularities have happened, it may be understood as meaning simply this: "Whenever a man's land is liable for a given year's state tax and has been assessed for it in some sort of a way by anybody claiming to carry on that function, and the tax has not been paid by the owner, then a deed made by a named public officer to some other person who has laid out the money for that year's tax shall pass a good title to the land described in it." The clause quoted comes to this in effect, and ought to be held constitutional in its illogical phrasing, if it is valid when drawn in these plain and bald words. The Indiana statute speaks in such direct words, but it does not go quite so far. Under it (Rev. St. Ind. § 6487) no sale is valid (1) if the land, when listed, was not liable to taxation; (2) when the taxes were paid before sale; (3) when the description is too imperfect to identify the land; (4) when the sale or attempt at sale was made with-

out authority of law. But there is one irregularity which occurs very often in ministerial sales for taxes, and which the most trenchant curative acts cannot heal. It is the lack of an identifying description of the land sold. It is well enough in assessing land to speak of "25x150 on A. street, bet. First and Second." This suffices to impose on the owner the duty of paying the tax assessed. But when it comes to a notice and a levy and sale of "25x150 on A. street, bet. First and Second," no title passes for want of identification; and the purchaser cannot identify the lot by showing that the assessed party had only one lot on the square. See *Waters v. Spofford*, 58 Tex. 115, and Mississippi cases cited in chapter 2, § 6.

III. Another plan for avoiding the many obstructions along the road to a good and perfect title, which had prevented bidding at tax sales, and had deprived the state or city of all revenue from those unwilling to pay their share thereof, is to substitute a judicial for a ministerial process. In the New England states an action of assumpsit for an unpaid tax is nothing unusual, and an execution upon the judgment may be "extended" as well upon land as upon goods. But only the net interest of the delinquent can thus be reached. A lien on the land assessed is not thus enforced. The "tax judgment," as it is given by the statutes of Illinois, Wisconsin, and other Western states, relates back to the assessment, and enforces a lien superior to all others. In the light of a local experience, this plan was carried out to the fullest in a charter amendment granted by the Kentucky legislature to the city of Louisville, and which is now part of the "law for governing cities of the first class." Here the city, having exhausted the preliminary stages of collection, demand by letter, distress of goods, and garnishment of rents, through its attorney, goes to work to bring regular chancery suits against each delinquent for the enforcement of the lien, gathering up in one suit all the tax bills in arrear for all the different parcels of land which he may own, and bringing in as defendants all mortgagees or lien holders, and, if the party assessed is a life tenant, also those in reversion or remainder. Everybody is summoned exactly as he would be in an ordinary suit between man and man. The city has no advantage over an ordinary suitor; only the tax bill attested by the assessor is *prima facie* evidence that everything down to that point has been done correctly. When a decree is entered, land is sold for the sums adjudged, with costs (if possible, only one lot, for the tax due on all that belong to the same owner), and for such other sums as incumbancers made parties defendant to the suit may have recovered on their cross petitions. The land is appraised before the sale as in other cases. If it brings two-thirds of the appraised value, the bidder takes, when the sale is confirmed, an absolute estate; if it brings less than two-thirds (which will happen but rarely), he has to wait one year during which the owner, as in other cases of chancery sales for debt, may redeem. Now, the evident result of such a proceeding, when it terminates (as it seldom does) in a sale, is to cut off not only all technical objections, by which, according to Mr. Blackwell's testimony, 98 out of every 100 tax titles brought before the courts

have proved worthless, but the most material objections are cut off as well. The tax may have been wholly illegal; the land being church property, or not yet fully granted by the United States, or for other reasons, may have been exempt; the tax may have actually been paid on the very first day when it fell due. All such matters ought be pleaded in defense in the suit on the tax lien, and should have been settled then and there in the decree. The constitution gives everybody the right to have a trial by the law of the land. Where the sale is ministerial, he must have this trial after the sale. When the sale is under decree of court, he has had it already; and, on the principle of the binding force of judgments, he cannot have another trial thereafter. Now, where suits are carried on in such an orderly manner, as those for city taxes at Louisville, and as suits on behalf of contractors for special assessments are carried on in California, Kentucky, and other states, there is no more hardship to the defendant in being concluded, when sued for a tax of \$50, which he may not owe, than if he is sued on a merchant's account of like amount, which he has paid before, or which he never did owe; and there is no more reason in the former case than there is in the latter for allowing the judgment to be assailed collaterally. But while such a plenary suit may be well enough for the enforcement of city taxes where two years' arrears are seldom less than \$40, and often more, in the hundreds, or even thousands, or for special assessments, which run up as high or higher, a suit involving so much labor and expense is not well fitted for the collection of state taxes, where both valuation and rate is generally low, and the sum to be raised does, in very many cases, not range above \$5 or \$10. For this and other reasons the mode of procedure is, in most states that have introduced the collection of taxes through the courts, much more summary. Thus, under the revenue law of Illinois, there is no separate suit against each delinquent, but (Rev. St. c. 120, § 188) the collector transcribes into a book kept by him for that purpose, and known as the "Tax, Judgment, Sale, Redemption, and Forfeiture Record," the list of delinquent lands and lots, with all the information necessary to be recorded, at least five days before the commencement of the term at which application for judgment is to be made; which book sets forth the owner, if known, the proper description of the land or lot, the year or years for which the tax or special assessments are due, the valuation on which the tax is extended, the amount of the consolidated and other taxes, the costs and total amount of charges. The book also shows in separate columns the amount paid before the rendition of the judgment, the amount of judgment, "remarks," the amount paid after judgment and before sale, amount of sale, amount of interest or penalty, amount of cost, amount forfeited to the state, date of sale, amount of sale and penalty, taxes of succeeding years, and so on to the redemption. In short, the record of hundreds or of thousands of tax suits is kept in column and figure work in that one book. The summons on which the court is asked for judgment is a newspaper advertisement, regulated by sections 182 and 185 of the same chapter, which contains the delinquent list. Under section 191 the court

examines the delinquent list, "and if defense (specifying in writing the particular cause of objection) by any person interested in any of the lands or lots is offered to the entry of judgment against the same, the court shall hear and determine the same in a summary manner without pleadings," "and shall pronounce judgment as the right of the case may be. Such order shall be signed by the judge." It will be seen (1) that the procedure is altogether in rem, like a suit in admiralty against the vessel, which begins with its seizure; but, as the land is not seized, the notice to the persons in interest is much less effective; (2) that there is no provision for a trial by jury, but the next section gives an appeal to the supreme court.

The law in other states works to some extent on the same lines,—i. e. all the delinquents for the county are dealt with in one record; the hearing is summary; and, if lienholders, remainder-men, and holders of equities are brought in with a view of giving them an opportunity to protect their interests, it is only through the procedure in rem, which addresses itself to all the world. But in some states the procedure is rather in personam, and for that very reason the law requires that those residing within the county should be served with process, at least, if they can be found. The Minnesota revision (chapter 11, §§ 70-78) brings out even more clearly the in rem character of the procedure. The form of citation which is published by the clerk of the district court reads very much like the monition under a seizure in admiralty. The claim is against no one person, but only against the parcels of land. Now, where the notice to the owner is so unsubstantial, and the proceedings of the court so quiet and so hurried, the judgment naturally does not carry the same weight in the minds of the community as a decision that is pronounced between man and man, under all the safeguards for a leisurely and impartial hearing. Like any other judgment, a tax judgment is void when the record shows that process, actual or constructive, was not served in the manner pointed out by the law. A published order cannot reach the owner unless the true name is given. *Simonson v. Dolan*, 114 Mo. 176, 21 S. W. 510,—where the deed under the judgment was held void mainly because Simonson was proceeded against under the name of Siemson; the owner's name being, in Missouri, required as an element of the published list. On the other hand, the judgment cannot be collaterally attacked by showing by proof outside of the record that the paper containing the published list was not the one designated for the purpose, or that the list appeared in a supplement, instead of the first sheet of the newspaper (*Watts v. Bublitz*, 99 Mich. 586, 58 N. W. 465), as such objections would not in the same state be allowed in the collateral attack on any other judgment. But if the monition has been issued in proper form, if the time for answer has passed, and no one has appeared to defend the "piece or parcel of land" where the proceeding is in rem, or himself where the proceeding is in personam, the courts can make no distinction between a technical and the most solid defense. It is the policy of the statute, said the supreme court of Minnesota in *Chisago Co. v. St. Paul & D. R. Co.*, 27 Minn. 109, 6 N. W. 454, that

every objection to the enforcement of the taxes appearing on the list filed should be litigated and decided in those proceedings. That the land is exempt, or that the tax has been paid, is a defense which must be made to appear by answer and proofs. But drawing this last conclusion seemed so shocking to the public conscience that the law was in 1887 amended so as to read: "The same presumption shall be deemed to exist as in respect to judgments in civil actions, except in cases where taxes have been paid before the entry of said judgment, or where the land was exempt from taxation." We shall, in the following chapter, discuss the length of time after which the tax lien in several of the states expires; but this can have but little effect upon the validity of the tax title, as the sale, when ministerial, is almost always made at the very first opportunity after the assessment of the tax, and, when judicial, the loss of the lien by limitation would, at least against the original owner, though it would not against intermediate assigns, be restored by the judgment, however erroneous.

Of more importance are the laws, which will also be treated, which seek to cure defective tax titles (and in some cases to cut off valid ones) by a much shorter limitation than that generally prevailing in actions for the recovery of land. We have incidentally stated elsewhere that those parties are on equitable grounds prevented from acquiring tax title whose duty it is to pay the taxes themselves or who stand in a fiduciary capacity to others interested in the land, as trustees or as cotenants. We may here refer on this subject to the very late case of *Perkins v. Wilkinson*, 86 Wis. 538, 57 N. W. 371; contra, *Ard v. Pratt*, 53 Kan. 632, 36 Pac. 995,—holding that one who is wrongfully kept out of possession may buy up a tax title to strengthen his own title with a view of regaining possession.

(1337)

CHAPTER XV.

TITLE BY PRESCRIPTION.

- § 175. General Outline.
- 176. Beginning and Length of the Bar.
- 177. Disabilities.
- 178. Exceptions and the Absolute Limit.
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- 180. Limit of the Tax Lien.
- 181. Possession—Actual, etc.
- 182. Possession—Hostile.
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§ 175. General Outline.

The most important among all muniments of title is a long and undisturbed possession. This has been recognized among all nations and in all ages.¹ But when land becomes an article of com-

¹ The Roman law distinguished between usucapio, by which a purchaser of land who, in good faith, by a lawful devolution (conveyance, will, or even heirship), had obtained the possession, obtained a good title to land in 10 years; and the præscriptio independent of good faith in the purchaser, and of lawful devolution to him, by which the true owner in 30 years, by being out of possession and failing to sue, lost the right to sue,—the possessor's title thus becoming perfect. The modern civil law knows little of usucapio, but has adopted the præscriptio of the Romans. It will, however, be seen that Texas has adopted the principle of usucapio. There is a short bar of time in the Jewish law, known as the Hazaka, which simply shifts the burden of proof; i. e. the possessor, after, say, three years, need not, in a contest with the former owner, produce a deed. After that time the loss of the deed will be presumed. Such was and still is in some states the old law, which, after a lapse of 20 years, "presumes" the discharge of a mortgage or judgment lien; and often a grant is "presumed" where none certainly was made. But, at present, the security of the owner or possessor, in nearly all

merce, and the pledge of land the readiest means for raising loans, the certainty of the possessor's title, its security against old and stale claims, becomes even more important than it was in a nation of barons and yeomen, holding through centuries their inherited lands. Hence, the tendency in our age is to shorten the period of time in which the claimant's right of action is lost;² to do away with all exceptions; not to allow the "length of the bar" to be inordinately extended by disabilities of infancy or coverture; to cut off after a certain delay, not only one form of recovery, but all proceedings which might disturb the possession.³

The American statutes for limiting actions for the recovery of land have been drawn in the main from the statute of limitations of 21 Jac. I. c. 16, which tolled the right of entry after an adverse possession of 20 years, and limited the writ of formeden, the ordinary action for recovering an estate tail, to the same length of time. An "ejectment" proceeds upon the fiction that the true owner, who seeks to recover in this action, still having the right of entry, had entered upon the land and while upon it delivered a lease for years to John Doe, or other nominal plaintiff.⁴ Hence, the longest term for de-

the states, rests on the better security of the law, which, after 20 or a smaller number of years, declares the mortgage or judgment to be extinguished, or at least directs that it shall no longer be enforced. (We shall see that in Maine the old plan of "presuming" payment of a mortgage, and disproving the presumption, is still in vogue.) Kent, in his Commentaries, does not treat of the statute of limitations, looking upon it as a regulation of proceedings only, and thus outside of the scope of his work.

² The statute of 32 Hen. VIII. is praised by Coke (Litt. 115a) as "profitable and necessary," as compared with the statutes of Merton and Westm. I. Yet it allowed 60 years for a writ of right.

³ The older statutes barred, by name, the actions such as ejectment or the right of entry, on which ejectment is based. Hence they did not, in terms, apply to bills in equity. The tolling of the right of entry in 20 years would not affect a writ of right, as long as that action was in vogue; and, since the supreme court of the United States, and the courts of other states except Kentucky, treated the words of the writ, "that the defendant was seized by taking the esplees," as an unmeaning form, a writ of right might be used almost in any case in which an ejectment would lie; and only the great expense and delicacy of the "writ of right" prevented the mischief which would have otherwise resulted. Compare *Speed v. Buford*, 3 Bibb. 57. *Contra*, *Green v. Liter*, 8 Cranch, 229.

⁴ See 21 Jac. I. c. 16, § 11: "All writs of formeden in descender, re-

laying an action of ejectment in any state is 20 years, except in Pennsylvania and Ohio, where on the notion that the owner out of possession might, by a formal entry, or by "continual claim" on or near the land, have kept his right of entry alive for another year, the length of the bar was fixed at 21 years. From this term, it comes down, through stages of 20, 15, 10, and 7, to as few as 5, years in California and other mining states, while the formal entry and "continual claim" are practically abolished.⁵

The English statute has its exceptions, which rest on the ground that the law does not demand the impossible, known as "saving for disabilities." Infants, married women, persons of unsound mind, persons imprisoned or "beyond the seas," had 10 years after the removal of disability, or their heirs after their death, in which to make entry or to sue out their writ. The statute does not say what shall be done when some one or more joint tenants or coparceners are under disability and others are not. All the American statutes have allowed this saving for disabilities, with the same mischievous silence as to the effect of disabilities in some of the part owners. Most of them have abolished the disability of being "beyond the seas," which, where retained, may be translated into "out of the

mainander and reverter, for any lands, &c., shall be sued within twenty years next after the title accrues; and no person shall make entry into such lands, but within like time." Section 12: "If any person entitled to such writs or having such right or title of entry, is at the time of its first accruing within the age of twenty-one years, feme covert, non compos mentis, imprisoned or beyond seas, he may bring action or make entry within ten years after full age, discoverture, coming of sound mind, enlargement out of prison, coming into this realm or death." The limitation of writs of right was, in England, till this and most other real actions were abolished in 1833, governed by the act of 32 Hen. VIII. c. 2, § 1: "No person shall have any writ of right, or make any prescription, title, or claim to any lands, or hereditaments of his ancestor or predecessor, and allege any further seizin of his ancestor, &c., except that within sixty years next before the teste of the writ, or before such prescription, title or claim wrought." The statute of James I. was repealed by 3 & 4 Wm. IV. c. 27, which almost did away with the requirement of "adverse" possession. See *Nepean v. Doe*, 2 Smith, Lead. Cas. 500.

⁵ Pennsylvania, Brightly, Purd. Dig. "Limitation of Actions," 4. Ohio, Rev. St. § 4977; California, Code Civ. Proc. § 319. The time by which an action for land is limited is generally the same as that in which a judgment for money becomes extinct, unless kept alive in the way prescribed, as shown in a former chapter.

state," or "out of the United States." Many have shortened the term of 10 years after death or removal of disability, though in some New England states it has been extended. The "persons imprisoned" have been defined more closely. The disability of coverture has been generally (but not always) repealed, where married women have the power to bring suit without the husband's consent. And, lastly, many states have introduced a term beyond which the beginning of an action must not be delayed, notwithstanding any intervening disabilities.⁶

In many states a shorter limitation than the ordinary 20, 15, or 10 years is established for certain titles favored by the policy of the law. Thus, in Pennsylvania, and at a later day in Kentucky, when the ill-advised grants of unsurveyed or badly surveyed lands threatened to hatch, or had already bred, so much litigation and hardship between the holder of the older patents out of possession and the settlers under younger patents, the latter were given a limitation of 7 years, with similar laws in North Carolina and Tennessee.⁷ In Illinois the same bar of 7 years was assured to any one holding "possession under a record title." In Texas the bar is in cases of an apparently good title reduced to 3 years. In Michigan, Wisconsin, and some other states, those buying in good faith at a sale by license from an administrator or guardian cannot be sued after 5 years, by the heirs, or by the infant coming of age, if the proceedings should turn out to be void.⁸ Similar short limitations are enacted in many states for the benefit of purchasers at tax sales, as otherwise the fear of dispossession might render tax titles worthless.⁹

⁶ The Kentucky act of 1796, copied from the Virginia act then in force, still had a saving clause for those "under the age of twenty-one years, feme covert, non compos mentis, imprisoned or not within this commonwealth." 1 Litt. Laws Ky. 380. This last disability has in modern laws been either dropped altogether or modified into absence from the United States; and that of imprisonment has been restricted to those who are imprisoned at hard labor, who are not allowed free intercourse with their friends.

⁷ The Pennsylvania act of 1705 is superseded by that of 1785. See Brightly, Purd. Dig. (Pa.) "Limitation of Actions," 1, 2. The Kentucky act of February 9, 1809 (4 Litt. Laws, 56), is now St. Ky. 1894, § 2513.

⁸ Illinois, Rev. St. c. 83, § 4; Texas, Rev. St. art. 3340; Michigan, St. §§ 6074, 6075, 6101; Wisconsin, § 3918; Minnesota, c. 57, § 50. The short limitations in Pennsylvania, Kentucky, Illinois, Georgia, etc., bear a strong resemblance to the "usucapio" of the Roman law.

⁹ Michigan, 3 How. Ann. St. § 8698, subd. 1; Wisconsin, § 3918; Minnesota,

On the other hand, the old principle of the common law, "nullum tempus occurrit regi" (no lapse of time stops the king), has in many states led to statutes naming a longer time in which the state is barred of its action than that in which persons or corporations must bring their actions. Purprestures—that is, private encroachments upon the public ground—are not allowed to ripen into property rights; and both under the land laws of the United States, and those of the states, it is the general rule that the squatter on the public domain cannot have an "adverse possession" against the nation or commonwealth, and thus the right to expel him can never be lost.¹⁰

But the most difficult branch of the law of limitations is this: When does the "statute begin to run"? And here again are two questions: Where an estate is held by a trustee, are the beneficiaries barred, when he is barred? When it falls to a reversioner, is he ever barred by the neglect of him who held the particular estate? And still more important is the question of "adverse possession." A suit for the recovery of land can only be brought against one who is in possession. If I am the owner of a vacant lot which is also claimed by some one else, I cannot institute an ejectment against him; because the defendant's wrongful possession, the ouster of the plaintiff, is as much of the gist of the action as the plaintiff's right of possession. In the New England states, where real actions (writs of disseisin) are still in vogue, I might be met by a plea of nontenure, and would have to pay costs. The limitation of time for bringing the action can only count from the time when it could first be brought, which is from the time when I was entitled to possession; but when the defendant (or tenant), or those from whom he derived the land by purchase or descent, first took such possession that I would have been justified in suing them for the land. Their possession must have been adverse to my claim,—not under a lease, or license, or permission from me. It is often difficult to determine whether a possession is adverse or amicable.¹¹ And in actions for

c. 57, § 50; Kansas, § 4093, subd. 2. Similar short limitations have in many states been enacted, within which the purchaser at a tax sale must sue for the possession of the land bid in by him for taxes,—e. g. Michigan, 3 How. Ann. St. § 8698, subd. 2, and 2 How. Ann. St. §§ 1131, 1132; Kansas, § 4093, subd. 3.

¹⁰ Bell v. Fry, 5 Dana (Ky.) 341. See, hereafter, under "Nullum Tempus."

¹¹ "No title by possession, unless the owner of it has so lost his possession that he can maintain an action to regain it." Huntington v. Whaley, 29 Conn.

the recovery of wild lands, or of lands which have within the period of limitation been wild, in whole or in part, other questions will also arise: What physical acts, such as cutting timber, will be regarded as acts of ownership? How often must they be repeated and continue, to constitute possession? When a small portion of land is actually tilled, enclosed, or built on, will this bodily possession (*pedis possessio*) of this small parcel be extended over the whole tract, to which the occupant lays claim, so as to make the limitation run in his favor as to all of it?¹²

There is much diversity in the circumstances under which one of several joint owners may become possessed to the exclusion of his fellows; and it must be determined at what time his possession became adverse to them, so that they may be deemed "ousted," and an action accrue to them, as the limitation will run from that time.¹³

There was at one time much dispute as to "cumulating" disabili-

391. An instance of how real a possession the defendant must have to justify a possessory action is *Frazier v. Lynch*, 97 Cal. 370, 32 Pac. 319, where his expelling the true owner bodily was held only a trespass, unless he had himself possession in fact. The husband cannot hold adversely to his wife while they live together. *Hendricks v. Rasson*, 53 Mich. 575, 19 N. W. 192. "It must be made plain that the real owner has been given a right of action." *Campau v. Lafferty*, 50 Mich. 114, 118, 15 N. W. 40. "The possession must have been so continuous for 20 years as to have furnished a cause of action every day during the whole period." *Jones v. McCauley*, 2 Duv. (Ky.) 14, 16. No judgment can be rendered for land of which the defendant is not in possession, *Moss v. Scott*, 2 Dana, (Ky.) 271; hence, if there is no possession, there is no cause of action, and the statute does not run. Some American state laws allow suits in the nature of ejectment to be brought for vacant lands, as we shall see (under the head of "Short Limitations" and "Limitation for and against the Tax Title") in Pennsylvania, Illinois, and Colorado; but the tendency has been to demand, even then, adverse possession, to make the limitation run, unless the statute says the contrary. We know of no American enactment like the English limitation law of 3 & 4 Wm. IV. c. 27, which lessens the element of "adverseness" required in the possession.

¹² The extension of possession to written or marked boundaries has played a great part in disputes between the holders of older and younger patents under state land laws, like the Virginia land act of 1779, where the conflicting surveys made a lap or interference. The most instructive case is *Young v. Withers*, 8 Dana, 165.

¹³ What is "ouster" among cotenants has been very fully treated in the work of Freeman on Cotenants, of which a second edition came out in 1886. See the short remarks about ouster among cotenants, 4 Kent, Comm. 370.

ties,—that is, about allowing disabilities to suspend the “running of the statute,” which did not exist when the right of action first accrued. In most of the states, this question is now settled either by unmistakable words in the statute or by judicial decision, against the right to a saving on account of any disability, except that which existed when the right first accrued.¹⁴

As to what is “adverse possession” there is still great diversity. The statutes of New York, and the states copying after it, impose conditions which in other states are wholly dispensed with. The effect of the Roman law has been quite marked in arriving at the definition of adverse possession.¹⁵

The limitation of suits for the enforcement of mortgages and liens (other than the judgment lien) also belongs to this chapter. Generally, a lien on land or a mortgage, when the mortgagee is not in possession, is barred in the same time as a possessory action. In some states, the mortgage, being held to be only an incident, is barred, along with the debt.¹⁶

As long as limitation rested on statutes like that of James the First, which profess to bar only the right of entry, or some named form of action, courts of equity were, either in the enforcement of liens and mortgages, or in suits for redemption or otherwise, for the setting up of a trust or equity against the legal title, not bound by the statute at all; but they established the doctrine of laches in analogy to it, on the principle that equity follows the law, and fur-

¹⁴ A slight divergence in the wording of some American statutes from that of 21 Jac. I. caused for a time the unhappy error of cumulating disabilities, now almost exploded.

¹⁵ The “substantial enclosure,” and the narrowing of “constructive possession” to a single farm, or to one of several tracts described in the deed, distinguish New York and its companions from the other states. Unless another than the owner is in possession adversely to him, the “fee draws to itself the possession.” This common-law maxim is declared by statute in New York, Code Civ. Proc. § 368; Dakota, Code Civ. Proc. § 44; Florida, § 1289; Wisconsin, § 4210; North Carolina, Code, § 146; South Carolina, Code Civ. Proc. § 101; Michigan, § 8701; Montana, Code Civ. Proc. c. 1, § 32; Nevada, § 3635; Idaho, § 4039; California, Code Civ. Proc. § 321.

¹⁶ Thus St. Neb. § 4542, applies to the enforcement of mortgages as well as to actions for the recovery of land. But in Iowa it was held that the limitation law does not affect “special proceedings.” *Hartley v. Keokuk & N. W. R. Co.*, 85 Iowa, 455, 52 N. W. 352.

thermore on the presumption (which is oftenest a fiction), indulged in after a lapse of 20 years, that the equity has been released or in some way satisfied. Indeed, the doctrine of laches went further than the statute; for, while the latter named no time within which a writ of dower (*unde nihil habet*) must be brought, a bill in equity for allotment of dower was never entertained if filed more than 20 years from the death of the husband.¹⁷ Most of the statutes now in force are so drawn as to reach equally all forms of procedure leading to the same end, whether it be at law, in equity, or "special."¹⁸

It has been much mooted whether the statute of limitation only regulates the remedy, by prescribing the time within which an action must be brought, just as another part of the law of procedure prescribes the form of the action; or actually takes the rights of the ousted owner from him, and confers them upon the party in possession.¹⁹ Many of the states have put limitations upon the former

¹⁷ In equity laches need not be pleaded. A bill showing delay beyond the statutory time is demurrable, unless it alleges disabilities or other excuse. *Campau v. Chene*, 1 Mich. 400. See Story, Eq. Jur. §§ 1520-1522. As to dower, see *King v. Merritt*, 67 Mich. 194, 215, 34 N. W. 689 (barred under law limiting all possessory actions); in equity, *Ralls v. Hughes*, 1 Dana (Ky.) 407, by analogy.

¹⁸ In Mississippi after actions at law are barred by § 2730 of the Code, the next section extends the same bar to suits in equity. So in Tennessee, Code, § 3461; Arkansas, § 4471. But in New York it has been decided that the section limiting suits for the recovery of lands does not apply to cases which were formerly cognizable in equity only, especially to suits for the redemption of land from mortgage. In Wisconsin actions which before 1857 were cognizable in equity only are expressly barred by lapse of 10 years; and in Kentucky, where the recovery is obtained by setting aside a fraudulent deed, the suit must be brought within the time fixed for bringing suits for relief from fraud.

¹⁹ One of the earliest cases is *Botts v. Shields*, 3 Litt. (Ky.) 32, 34, arguendo if the lessors of the plaintiff had been in possession adverse to the elder patentee for 20 years, they would have become invested with the title. As to chattels, the view of a change in ownership is based on *Stokes v. Berry*, 2 Salk. 421, and *Taylor v. Horde*, 1 Burrows, 119, seems to establish it as to the right of entry on land. It is later upheld in Kentucky in *Chiles v. Jones*, 4 Dana (Ky.) 483; *Breeding v. Taylor*, 13 B. Mon. 482, and *McCracken County v. Mercantile Trust Co.*, 84 Ky. 344, 1 S. W. 585. So in West Virginia, *Hall v. Hall*, 27 W. Va. 468, 480; in Virginia, *Taylor v. Burnsides*, 1 Grat. 165. Judge Cooley (Const. Lim. [6th Ed.] p. 448) considers this view as being now fully established, and the title gained by the claimant's delay in suing as good as

ground, by embodying the "time within which actions must be brought" into their Code of Civil Procedure, or of practice.²⁰ In other states, as in Rhode Island, Maryland, Georgia, Mississippi, and Texas, and in certain short limitation acts in Illinois and Colorado, another view is taken,—that is, the ownership or title to the lands is, by the words of the statute, vested by prescription in the possessor.²¹ And, really, this is the law everywhere; for the rights of the plaintiff in trespass, or of the complainant in a bill to quiet the title, may rest on nothing but length of possession.²² Yet the saving in favor of minors, feme covert, or persons of unsound mind, is

if it were obtained by grant, and he quotes, among other cases, *Brent v. Chapman*, 5 Cranch, 358; *Leffingwell v. Warren*, 2 Black, 599; *Blacknell v. Comstock*, 113 U. S. 149, 5 Sup. Ct. 399; *Bagg's Appeal*, 43 Pa. St. 512; *Mitchell v. Campbell*, 19 Or. 198, 24 Pac. 455. Many of the statutes, as will be shown, in express words transfer the title after limiting the action.

²⁰ This has been done in New York, California, Minnesota, and all those states which borrowed the form and arrangement of their laws from those actually adopted in New York, or from those proposed by David Dudley Field. In *Way v. Hooton*, 156 Pa. St. 8, 26 Atl. 784, the statute is said to affect the remedy only. Yet the New York Code, and those derived from it, by forbidding not only actions, but defenses, based on a barred right of entry, reach the same result as if they conferred the title. See, also, *Fleckner v. Bank of U. S.*, 8 Wheat. 338; *Jackson v. Dieffendorf*, 3 Johns. 269.

²¹ See the places in notes to next section. Thus in North Carolina the Code, § 144, transfers the barred title. In Georgia the Code has done away with limitation, and has put "prescription" in its place. *Pollard v. Tait*, 38 Ga. 439. See, also, under "Short Limitations," *infra*, those of Illinois and Colorado.

²² *Toll v. Wright*, 37 Mich. 93 (the right of entry being taken from the old owner); *Mitchell v. Campbell*, 19 Or. 198, 24 Pac. 455; *Hardy v. Powell*, 40 Mich. 415. Some statutes, like that of Wisconsin (§ 4208), bar all defenses based on title, unless the trespasser, etc., was seised within the statutory time. In other states also, with no such written provision, the plaintiff in trespass may rely on the bar of the statute; e. g. *Lewis v. John L. Roper Lumber Co.*, 113 N. C. 55, 18 S. E. 52, and many other of the cases which are cited hereafter. In fact, however, when the time after savings and exceptions has run out, the statute everywhere (except in Tennessee, when the possessor is an intruder without color of title) transfers to him the former owner's title, and he can bring trespass or ejectment against the former owner and all others. But he can sue only for a trespass that was committed after the bar had run out. *Railway Co. v. Cusenberry*, 86 Tex. 529, 26 S. W. 43.

compatible only with the former theory. Hence, in some states a time has been fixed when adverse possession ripens into a title, notwithstanding the disabilities of the dispossessed owner. The distinction between the two views becomes also important when the legislature undertakes to enact new limitations, shorter than they were before, operating upon rights of entry already acquired.²³

Many judges have spoken of the statute of limitations in words of high praise, as a "statute of repose," and reproved those strict interpretations which would fritter its benefits away,—and thus especially in applying the short limitations which many of the Western states have enacted for the protection of those who buy land at execution sales, or when it is sold under license by administrators or guardians.²⁴ Yet there are not wanting other decisions (especially where the case turns on the sufficiency of the adverse possession) in which it is said, or at least intimated, that a law divesting the true owner of his property must be strictly pursued.²⁵

A few words on the constitutional aspects of laws limiting actions for land, and transferring the title of the owner who sleeps over his rights to his adversary in possession. The legislature has (unless the state constitution forbids all retrospective enactments) the undoubted power to pass a law prescribing a time within which a right of entry that has already accrued must be enforced.²⁶ The time allowed after the passage of the act must be reasonable; but, unless it is grossly unreasonable, the courts will not interfere with the discretion of the lawmaking department.²⁷ A very fair view

²³ E. g. under Ky. St. 1894, § 2508, it is 30 years. See *infra*, in section on "Exceptions," etc.

²⁴ *Reilly v. Blaser*, 61 Mich. 399, 28 N. W. 151; *Gautier v. Franklin*, 1 Tex. 732; *Greene v. Anglemire*, 77 Mich. 168, 171, 43 N. W. 772.

²⁵ *Brandt v. Ogden*, 1 Johns. 156; *Coburn v. Hollis*, 3 Metc. (Mass.) 125; *Paine v. Hutchins*, 49 Vt. 319; *Judson v. Duffy*, 96 Mich. 258, 55 N. W. 837 (clear and cogent proof of adverse possession is wanted); *Ruffin v. Overby*, 105 N. C. 78, 11 S. E. 251 (nothing to be left to conjecture).

²⁶ *Vandiver v. Hodge*, 4 Bush, 538.

²⁷ *Pearce v. Patton*, 7 B. Mon. 168; *Berry v. Ransdall*, 4 Metc. (Ky.) 292, 296 (only 30 days given by the new statute); *Parmenter v. State*, 135 N. Y. 154, 31 N. E. 1035. The law is understood to be prospective only, unless the contrary intention is clearly shown. *Heyward v. Judd*, 4 Minn. 483 (Gil. 375); *Phinney v. Phinney*, 81 Me. 450, 17 Atl. 405.

has been taken of this matter in the state of Washington. The old limitation having been 20 years, and a new statute introducing the bar of 10 years for actions of ejectment, the courts allow the full 10 years from the passage of the act to those who then had rights of entry, not to exceed 20 years on the whole, and thus the new law could not be said to have been applied retrospectively.²⁸ When the bar is complete, under the older limitation law, the land must be deemed the property of him who is in possession, and the legislature has no power to take it from him, any more than if he had obtained his estate by purchase or descent.²⁹ The owner in possession cannot be compelled to litigate with an adversary who has neither title nor possession; that is, no law can be passed which would render a void tax deed, sheriff's deed, or executor's deed good and valid by lapse of time, while the grantee under the deed allows the old owner to remain in possession. Hence, the statutes which forbid the attacks upon such deeds after a given number of years have been so construed that the time is counted from the purchaser's entry; for until then the owner, not having been harmed by dispossession, cannot be blamed for his failure to sue.³⁰ As long as the limitation is not completed, the lawmaker may extend the time, or may otherwise clog the acquisition of the prescriptive title.³¹ (The times at

²⁸ Raymond v. Morrison, 9 Wash. 156, 37 Pac. 318; Tacoma Bldg. & Sav. Ass'n v. Clark, 8 Wash. 289, 36 Pac. 135; Packscher v. Fuller, 6 Wash. 534, 33 Pac. 875.

²⁹ Lastly v. Cramer, 2 Doug. (Mich.) 307; Hill v. Kricke, 11 Wis. 442; Lindsay v. Fay, 28 Wis. 177.

³⁰ Stearns v. Gittings, 23 Ill. 387; Hill v. Kricke, 11 Wis. 442; Groesbeck v. Seeley, 13 Mich. 329; Baker v. Kelley, 11 Minn. 480 (Gil. 358); Monk v. Corbin, 58 Iowa, 503, 12 N. W. 571; Farrar v. Clark, 85 Ind. 449; Dingey v. Paxton, 60 Miss. 1038. Judge Cooley (Const. Lim. p. 449) discusses these cases, and the somewhat diverging decision of the supreme court of the United States in Leffingwell v. Warren, 2 Black, 599, distinguishing it under the peculiar Wisconsin statute. A recent provision in Michigan (Supp. § 8698) has so remodeled the law of limitation on executor's and tax deeds as to conform it to these views. In Toll v. Wright, 37 Mich. 93, it is said, however, that the legislature can give force to proceedings that were void in the beginning. In Dicken v. Johnson, 7 Ga. 484, it was said there is no limitation or plea of laches to a suit for setting aside a deed under which possession has not been taken. Limitation or lapse of time proving laches never runs against the possessor. Parker v. Shannon, 137 Ill. 376, 27 N. E. 525.

³¹ Sharp v. Blankenship, 59 Cal. 288, where the act requiring payment of
(1348)

which the lien of a judgment expires, or when it is no longer alive so as to sustain the issue of an execution or an execution sale, have been discussed in a former chapter).

§ 176. Beginning and Length of the Bar.

In ordinary cases, when neither the plaintiff nor the defendant occupies a vantage ground, entitling the former to a longer or the latter to a shorter period of limitation, actions "for the recovery of land" may, in the several states and territories, be brought within the following periods of time: In Pennsylvania and Ohio, within 21 years from the time when the action accrued, or the possession became adverse.³² In Maine, Massachusetts, New Hampshire, Rhode Island, New York, New Jersey, Indiana, Illinois, Delaware, Maryland, North Carolina, Georgia, North and South Dakota, and Colorado, within 20 years; also in Wisconsin, but the exceptions here and in North Carolina which bring in a limitation of 10 and of 7 years respectively, are broad enough to cover the greater number of actions for land that are likely to be brought.³³ In Vermont (where the same limitation bars the state), Connecticut, Michigan, Minnesota, Kentucky, and Kansas, within 15 years; probably also

all taxes to make a holding adverse was applied to one which had already run for part of the time. *Osborn v. Jaines*, 17 Wis. 573.

³² See note 5 to section 175.

³³ Maine, c. 105, § 1; Massachusetts, Pub. St. c. 196, § 1; New Hampshire, c. 217, § 1; Rhode Island, c. 205, § 4; New York, Code Civ. Proc. §§ 365-367; New Jersey, "Limitation of Action," 17; Indiana, § 293, subd. 6; Illinois, c. 83, § 1; Delaware, c. 122, §§ 1, 2; North Carolina, Code, §§ 141-144 (part of the law of procedure); Georgia, § 2682; Dakota Territory, Code Civ. Proc. § 41. The Rhode Island law makes a peaceable possession for 20 years ripen into title, but in the next section saves the rights of those under disability. In Georgia, "actual adverse possession of lands, by itself, shall give good title by prescription against every one except the state or persons under disabilities." Colorado had no limitation for one in possession without color of title at all, until the act of April 8, 1893, which adopts 20 years as the bar for right of entry or action. Section 3 of the act defines at what time the disseisin takes place from which to count, very much in accordance with the general rule. It was the opinion until lately that the Maryland act of 1715, or the act of 21 Jac. I. c. 16 (in force in Maryland), is still in force in the District of Columbia. The act of Jac. I. is certainly in force in Maryland. See Alexander's British St. p. 446; *Hanson v. Johnson*, 62 Md. 25.

the District of Columbia.³⁴ In Virginia, West Virginia, South Carolina, Alabama, Mississippi, Missouri, Nebraska, Oregon, Texas, New Mexico, and Wyoming, within 10 years.³⁵ In Florida, Tennessee, Arkansas, and Utah, within 7 years.³⁶ In California, Nevada, Idaho, Montana, and Oklahoma, within 5 years. In these states actions for mining claims are separately named, and they are barred in the same time as actions for land, except in Nevada, where only 2 years are allowed, and in Montana, where mining claims other than lode claims must be sued for within 1 year.³⁷ Moreover, in California, Nevada, Idaho, and Montana (and there is language of like effect in many other states), the defendant in an action cannot plead a defense based on the ownership of land unless he was seised of it within 5 years before the action was brought.³⁸

The idea that the ousted owner begins his effort to regain possession by a peaceable entry, which he follows up by an action, has found lodgment in the statutes of limitation of several states in such a shape that it may in effect extend the time for bringing suit by one year. Thus, the Connecticut statute says: "And no such entry [made within 15 years after accrual of title] shall be sufficient, unless an action be commenced thereon and prosecuted to effect within one year." Thus, a claimant who has, near the end of his 15 years (in

³⁴ According to Abert's Digest of Statutes for the District of Columbia, the bar seems to have been reduced to 15 years by an act of the territorial assembly of 1871, the editor quoting Welch v. Cook, 97 U. S., 542, for the position that the assembly had legislative powers. Vermont, §§ 951, 979; Connecticut, Gen. St. § 1368; Michigan, How. Ann. St. § 8698; Wisconsin, Rev. St. §§ 4212-4215; Minnesota, c. 66, § 4; Kentucky, St. 1894, § 2505; Kansas, Gen. St. par. 4093, subd. 4.

³⁵ Virginia, §§ 2915-2918; West Virginia, c. 104, § 1; South Carolina, Code Civ. Proc. § 98; Alabama, § 2614; Mississippi, §§ 2730, 2731; Iowa, § 2529, subd. 5; Missouri, § 6764; Nebraska, § 4542; Washington, Code Proc. § 112; Wyoming, § 2366; Probst v. Trustees of Board of Domestic Missions, 129 U. S. 182, 9 Sup. Ct. 263.

³⁶ Florida, §§ 1287, 1288; Tennessee, § 3461; Arkansas, § 4471.

³⁷ California, Code Civ. Proc. § 319; Idaho, § 4036; Montana, Code Civ. Proc. § 29; Nevada, §§ 3632, 3633. There are shorter limitations for mining claims. Nevada, § 3632; Montana, Code Civ. Proc. c. 2, § 40. Patented mining claims are within the short bar in Nevada. South End Min. Co. v. Tinney, 35 Pac. 89. The broader bar in Colorado was enacted in 1893 See supra, note 33.

³⁸ See sections of statute following next those quoted in note 37.

Connecticut), found that he has a good title to a tract in the possession of another, but is not quite ready to sue, can gain one year's time by a transient entry. Similar provisions are found in the laws of Michigan and Wisconsin, but the clause is framed (which renders the whole ineffectual) "unless an action is brought within one year and within the time herein limited."³⁹

The time of limitation runs until the action is "commenced," which in some states is done when the complaint, declaration, or petition is filed, and a summons is issued, in other states only when the summons or notice is actually served,—a matter already treated in the section on "Lis Pendens," and for which the reader must consult the practice act or Code of Procedure of his state.⁴⁰

Where a material amendment is made in the declaration or complaint, such as introducing a new plaintiff (in the old practice, a new demise, and new lessor of the plaintiff), the bar of limitation generally runs on till such amendment is made; that is, till the

³⁹ The reader is referred to 3 Bl. Comm. 176–178, for the doctrine of disseisin, and for the old doctrine by which the right of entry of the disseised is tolled by a descent cast, and how that doctrine is there modified till nothing but the limitation of 20 years (saving disabilities) tolls the right of entry. He is referred also to St. 4 Anne, c. 16, § 16, which directs that no entry shall be in force to satisfy the statute of limitations or to avoid a fine unless an action be thereupon commenced within one year and prosecuted with effect. The Wisconsin statute copies that of Queen Anne, but adds that the action must be brought within the 20 or 10 years from the accrual of the right of entry, thus making the one year useless. But it seems that in Pennsylvania a formal entry on land adversely held, though not good as a new starting point, is good for one year. *Douglas v. Irvine*, 126 Pa. St. 643, 17 Atl. 802.

⁴⁰ Such is section 398 of the New York Code of Civil Procedure. The beginning of the action for the purpose of the statute of limitation is not necessarily the same as for perfecting the lien of lis pendens. The former is in many states done when the summons is placed in the hands of the sheriff; the latter, only when it is served. In Iowa, for the purpose of limitation, a notice put in the sheriff's hands, begins an action; when the notice is served by private hands, the action begins with the service only. Statute runs till process issues. *Hallum v. Dickinson*, 47 Ark. 120, 14 S. W. 477. The action is not begun (though, otherwise, filing of complaint is enough for the purpose) if the plaintiff forbids process to issue. *Tribby v. Wokee*, 74 Tex. 142, 11 S. W. 1089. In Kentucky, a delay in reissuing process that was not served, equal in length to the bar, is held an abandonment of the action. *Clark v. Kellar*, 3 Bush, 223.

action is, as to parties and subject-matter, in the shape in which those prosecuting it desire to try it.⁴¹ When the grantor or lessor reserves to himself a right of re-entry on conditions broken within a given number of years, the right to repossess the land accrues only after condition broken, and, if he reserves a right to redeem or repurchase, only after the offer to redeem.⁴² And, on the same ground, the right to redeem a mortgage expires only with the statutory period, counted from the day when the mortgagee, as such, enters into possession,—certainly, when that possession is taken at or after the day upon which the mortgage, by its terms, would become an absolute deed for condition broken.⁴³ But there are so many questions as to the time within which mortgages may be enforced, or may be redeemed, that we must leave this subject for separate treatment.⁴⁴ Where the owner has a "perfect equity,"

⁴¹ Miller v. McIntyre, 6 Pet. 64 (amendment making defendants); Wilson's Adm'r v. Holt, 91 Ala. 204, 8 South. 794; Pollard v. Tait, 38 Ga. 439. In Kauffman v. Wootters, 79 Tex. 205, 13 S. W. 549, an amendment not changing relief sought was not regarded. Amendment to suit in plaintiff's own right, putting it in fiduciary right has to be in time. Morales v. Fisk, 66 Tex. 189, 18 S. W. 495. One giving better description need not. Henry v. Whitaker, 82 Tex. 5, 17 S. W. 509. Amendment to conform to proof not fatal. Smullen v. Phillips, 92 Cal. 408, 28 Pac. 442. Plaintiff may go back to his original petition as of its date. Mayer v. Walker, 82 Tex. 222, 17 S. W. 505. Amended bill reinstating parties already dismissed must be in time. Wilson's Adm'r v. Holt, 91 Ala. 204, 8 South. 794. See, also, Evans v. Cleveland, 72 N. Y. 486. In many cases, where a claim against land must be brought within a prescribed time, the institution of a suit for the sale of such land, and a general settlement and disposition of the proceeds will stop the running of the statute against the lien claim. See Paxton v. Rich, 85 Va. 378, 7 S. E. 531. In other states, or under other circumstances, the bar may run on till the lien claim is presented. See Hull's Adm'r v. Hull's Heirs, 35 W. Va. 155, 13 S. E. 49. The latter view is taken in Biggs v. Lexington & B. S. R. Co., 79 Ky. 470.

⁴² Cook v. Hopkins, 68 Mich. 514, 36 N. W. 790; Cook v. Rounds, 60 Mich. 310, 27 N. W. 517 (where the vendor reserved a right of re-entry if payments were not made in time); Husheon v. Husheon, 71 Cal. 407, 12 Pac. 410.

⁴³ Such is the elementary position, as found in 2 Bl. Comm. 158, note; Story, Eq. Jur. § 1520. Kent, in his Commentaries, is silent on this as on other limitations.

⁴⁴ In several states, suits in equity, or actions which would have been suits in equity, are governed by other limitations than possessory actions. The "presumption of payment," which may be rebutted, is still the only bar in Maine for bonds under seal. See, infra, under "Foreclosure and Redemption."

which he can, at will, by applying for and obtaining a deed or patent, turn into a legal title, and finds the land in the adverse possession of another, he ought to put himself in the position to bring his ejectment suit, and cannot excuse himself on the ground that his action at law did not lie.⁴⁵

A right of entry or action may, by the terms of deed or will, fall on one in remainder, vested or contingent, or upon a reversioner, while some one is in possession under a claim hostile to the terms of such deed or will. If the wrongdoer has taken possession before the deed or will took effect, then, of course, those in remainder and reversion derive their title from a dispossessed devisor or grantor, and the bar runs from the disseisin.⁴⁶ But, if the wrongful possession begins after the grant or devise takes effect, it is no ground for an action to him in remainder or reversion, until his estate falls in by the death of the antecedent life tenants; and, he having no cause of action until then, limitation begins to run against him only from that time.⁴⁷ But, where a wife, without the needful consent

⁴⁵ This matter will be again referred to under the head of "Nullum Tempus," where the legal title is still in the United States or in the commonwealth. Every act on the part of the purchaser entitling him to a patent must have been performed, to make the bar run against him. *Mills v. Traver*, 35 Neb. 292, 53 N. W. 67; *Carroll v. Patrick*, 23 Neb. 835, 37 N. W. 671; *Doe v. Hearick*, 14 Ind. 242; *Bauman v. Grubbs*, 26 Ind. 419 (*Elmendorf v. Taylor*, 10 Wheat. 168, and *Murphy v. Blair*, 12 Ind. 184, on 20 years' limitation against the owner of an equitable estate, are quoted); *Dutton v. Thompson*, 85 Tex. 115, 19 S. W. 1026 (land sold by the state and paid for, but patent not issued). And a purchaser at execution has so many years only from the day on which he could have demanded a sheriff's deed, though by his own default he got it at a later day. *Chalfin v. Malone*, 9 B. Mon. 496. As to mining claim, see *Mayer v. Carothers*; 14 Mont. 274, 36 Pac. 182.

⁴⁶ It was thus held as to issue in tail in *Duroure v. Jones*, 4 Durn. & E. (4 Term R.) 308.

⁴⁷ *Pinckney v. Burrage*, 31 N. J. Law, 21; *Merritt v. Hughes*, 36 W. Va. 357, 15 S. E. 356; *Cook v. Caswell*, 81 Tex. 678, 17 S. W. 385; *Pluche v. Jones*, 54 Fed. 860; *Taylor v. Kemp*, 86 Ga. 181, 12 S. E. 296; *Bagley v. Kennedy*, 81 Ga. 721, 8 S. E. 742; *Id.*, 85 Ga. 753, 11 S. E. 1091; *Kirksey v. Cole*, 47 Ark. 304, 1 S. W. 778 (of homestead from full age of youngest child); *Haskett v. Maxey*, 134 Ind. 182, 33 N. E. 358 (modifying an earlier case); and *Irey v. Mater*, 134 Ind. 238, 33 N. E. 1018 (children by first husband under Indiana law of descent,—see chapter on "Descent," § 19,—not till after death of remarried widow). Older cases are: *Fogal v. Pirro*, 10 Bos. (N. Y.)

of the husband, conveys her land, and delivers possession, the husband, as heir or tenant by courtesy, claiming under her, is barred by the 15 years or other period, running from the delivery of possession, not from the death of the wife. He is not a remainder-man.⁴⁸ In like manner, where a void allotment of dower, or none, has been made, or where the widow has by an attempted sale abandoned her homestead, the limitation in favor of the widow's grantee begins to run as soon as he takes possession, and does not await her death.⁴⁹ Decisions like these are rendered in states in which, under the statute, the plaintiff in the ejectment must have been seised within a named number of years; but the remainder-man in such cases was never seised at all, not even constructively; and his predecessor was seised only at a time much more remote. But the occurrence of words to this effect in the statute have never stood in the remainder-man's way.⁵⁰

In the Virginias there are still many married couples living, and not a few in some other states, where the wife owned land which the husband may have conveyed (generally with the ineffectual, because informal, assent of the wife) at a time when "marital rights"

100; *Clarke v. Hughes*, 13 Barb. 147; *Jackson v. Schoonmaker*, 4 Johns. 390. In *Sutton v. Casselleggi*, 77 Mo. 397, it is said that the life tenant cannot, by any acts or declarations, make his or his grantee's possession adverse to the remainder-man, so as to set the statute running. *S. p., Keith v. Keith*, 80 Mo. 125. Only in *Burgett v. Taliaferro*, 118 Ill. 503, 9 N. E. 334, under the Illinois seven-years limitation law, this doctrine is drawn into doubt; but there is no decision against it, and the principle is reasserted in *Rohn v. Harris*, 130 Ill. 525, 22 N. E. 587. The widow's unassigned dower is no estate, and does not stop the statute from running against her grantee. *Smith v. Shaw*, 150 Mass. 297, 22 N. E. 924. *King v. Leeves*, 36 Ga. 199, contra, based on the forfeiture of the life estate by conveyance in fee, is obsolete. In *Butler v. McMillan*, 88 Ky. 414, 11 S. W. 362, a life estate stood out so long that a possession of 71 years became unavailing. Nearly so it was in *Davis v. Tebbs*, 81 Va. 600. *Thompson v. Simpson*, 128 N. Y. 270, 28 N. E. 627, is also a very hard case. See, for exceptions, *infra*, under "Absolute Limit." Contra, under common-law marital rights, bar ran against husband immediately on marriage. *Peck v. Lockridge*, 97 Mo. 549, 11 S. W. 246.

⁴⁸ *Jenkins v. Dewey*, 49 Kan. 49, 30 Pac. 114; *Hanson v. Johnson*, 62 Md. 25.

⁴⁹ *Falls v. Wright*, 55 Ark. 562, 18 S. W. 1044; *Sansom v. Harrell*, 55 Ark. 572, 18 S. W. 1047; *Henderson v. Bonar* (Ky.) 11 S. W. 809.

⁵⁰ *Redding v. Redding*, 15 Tex. 251 (relying on 2 *Smith, Lead. Cas.* p. 413).
(1354)

were in full vigor, and when the husband's deed carried his own life estate, including his courtesy. The purchaser in such cases becomes a tenant pur autre vie. The wife or her heirs can only bring ejectment when the husband's death makes an end to the purchaser's estate.⁵¹ Where the marital right, or the husband's freehold in right of his wife, is taken away by statute, the action accrues to the wife at once; and the statute is, at most, kept from running during her life, by her disability of coverture.⁵²

But, in the absence of collusion, or of some special grounds, the beneficiaries of a trust are barred when their trustee is barred. The former might labor under disabilities, or the equitable estate might be parceled out among life tenants and remainder-men; yet, where the land is held adversely to the trustee, and to the title which he represents, all the cestuis que trustent, who must claim through him, will be barred with him.⁵³

⁵¹ *Merritt v. Hughes*, 36 W. Va. 356, 15 S. E. 56, construing chapter 104, § 4, of West Virginia Code (suit for partition is not barred either, as one in remainder cannot demand a partition; *Seawell v. Berry*, 55 Fed. 731). Such a case was *Stephens v. McCormick*, 5 Bush, 181, in Kentucky, before the married woman's act of 1846 deprived the husband of the freehold.

⁵² And so where the wife's deed was void through the husband's not joining. *O'Dell v. Little*, 82 Ky. 147. See, also, Pennsylvania cases, *infra*, under the 30-years limitation in that state, for the distinction. Also, in Texas, the husband can sell other community property, but not the homestead; if he sells and delivers the latter, limitation against the wife runs at once. *Hussey v. Moser*, 70 Tex. 42, 7 S. W. 606.

⁵³ Discussed in *Cholmondeley v. Clinton*, 2 Jac. & W. 1; *Elmendorf v. Taylor*, 10 Wheat. 174; *Molton v. Henderson*, 62 Ala. 426; *Patchett v. Pacific Coast Ry. Co.*, 100 Cal. 505, 35 Pac. 73. Discussed with regard to section 2313 of Georgia Code, allowing active trusts and trusts for minors, in *Knorr v. Raymond*, 73 Ga. 749; *Wingfield v. Virgin*, 51 Ga. 139; *East Rome Town Co. v. Cothran*, 81 Ga. 359, 8 S. E. 737. See, contra, *Lamar v. Pearre*, 82 Ga. 354, 9 S. E. 1043, where the office and estate of the trustee was held to expire with that of the cestui for life, and the remainder-man was therefore not barred. Where the life tenant is trustee, and sells wrongfully, the cestui in remainder is not barred. *Gudgell v. Tydings* (Ky.) 10 S. W. 466; *Croxall v. Shererd*, 5 Wall. 268 (under the peculiar words of the New Jersey statutes); *Harlan v. Peck*, 33 Cal. 515 (under the California law, which makes the administrator a trustee for the heirs of the testator's land, and limitation in favor of buyer from him under void deed runs at once; followed as to that state in *Meeks v. Olpherts*, 100 U. S. 564). See, as to

Where a judgment or execution lien rests on land, the better opinion seems that when this lien is perfected into a title by a sale, the right to take possession under such sale will not only against the original owner, but also against his grantee, remain in force till the time of limitation has run from such act, in or about the sale, as would entitle the purchaser to possession; but it has been held in Alabama that, when a grantee has held the land for the statutory time, the purchaser under the execution can no longer sue him for possession.⁵⁴ We have seen that not every occupancy is such an adverse possession, within the meaning of the limitation acts. We shall examine what constitutes an adverse possession. Meanwhile, we can only state that the bar counts only from the day when a previous holding becomes adverse, if it was not such before.⁵⁵

Generally speaking, the same period which bars an ejectment bars also a suit for dower, whether at law or in equity. It seems that the widow must sue for allotment. If so, she might and should sue, though the possession is vacant; and the bar would count from the death of the husband. But it has been lately held, in Massachusetts, that the suit for dower is so far possessory that the widow is not in default while she is in joint possession with the heirs.⁵⁶

A mining lease is an interest in land. A suit for its recovery is an "action for the recovery of land," and is governed by the same law of limitation.⁵⁷ A life estate may also be gained by possession and the bar of the statute, as well as an estate in fee, if the possessor

sales of slaves, *Darnall v. Adams*, 13 B. Mon. 273. The leading English case is *Lewellen v. Mackworth*, 2 Eq. Abr. 579. In New York (*Bucklin v. Bucklin*, *40 N. Y. 141) the sole beneficiary in a mortgage, as the remedy of foreclosure or sale is equitable, was held entitled to his savings.

⁵⁴ *Coulter v. Philips*, 20 Pa. St. 154; *Pratt v. Pratt*, 96 U. S. 704. *Contra*, *Barclay v. Smith*, 66 Ala. 230.

⁵⁵ *Fleming v. Burnham*, 100 N. Y. 1. See, hereafter, cases under "Possession Actual," and "Possession Hostile."

⁵⁶ *Proctor v. Bigelow*, 38 Mich. 282; *Beebe v. Lyle*, 73 Mich. 114, 40 N. W. 944; *King v. Merritt*, 67 Mich. 194, 34 N. W. 689; *Anderson v. Sterritt*, 79 Ky. 499 (runs though land vacant); *Hastings v. Mace*, 157 Mass. 499, 32 N. E. 668 (not when widow has joint possession); *Parker v. Obear*, 7 Metc. (Mass.) 24 (writ for dower like writ of entry).

⁵⁷ *Benavides v. Hunt*, 79 Tex. 388, 15 S. W. 396 (relying, for the separate estate in mines, on *U. S. v. Castellero*, 2 Black, 17, 220); *Armstrong v. Caldwell*, 53 Pa. St. 288.

claims to hold for life,—for instance, if he derives color of title from a deed or will conferring the land on him for such a period; and so of any other estate less than a fee.⁵⁸

When the action is begun in the last allowable year, on the same day of the same month in which the right first accrued, it is the opinion, in most of the states (perhaps in all of them excepting Pennsylvania), that it comes too late. The expressions of law writers and judges on computation of time are rather confused. Lack of a mathematical turn seems to run through their minds. Statutes mention time either as a minimum (e. g. three months' notice to a tenant, service ten days before a term) or as a maximum, as in limitation laws. The English precedents are that suit on the same day in a later year is too late,⁵⁹ without regard to the question whether the plaintiff had the whole of the earlier day to bring the action (as a boy coming of age on such day) or only a part of the day (as a remainder-man, on the day when the life-tenant dies).⁶⁰ But the contrary doctrine has become the settled law in Pennsylvania and in New Jersey.⁶¹

§ 177. Disabilities.

The several American communities have, in defining the disabilities which excuse delay in entry or action, started from the statute of James the First, with its fivefold division: (1) under 21 years of age; (2) married women; (3) persons of unsound mind; (4) "out of the realm, or beyond seas"; (5) imprisoned.

⁵⁸ *Childers v. Bumgarner*, 8 Jones (N. C.) 297; *Staton v. Mullis*, 92 N. C. 623.

⁵⁹ *Norris v. Hundred of Gantris*, 1 Brownl. & G. 156 (robbery October 9, 13 Jac. I.; hue and cry October 9, 14 Jac. I.—too late); *People v. Wood*, 10 N. Y. Leg. Obs. 61, Brightly, N. Y. Dig. p. 3582, pl. 18 (offense October 8, 1848; indictment October 8, 1851—too late); *Chiles v. Smith*, 13 B. Mon. 460, to same effect.

⁶⁰ *Ross v. Morrow*, 85 Tex. 172, 19 S. W. 1090 (plaintiff coming of age April 16, 1881, cannot sue April 16, 1886); *Phelan v. Douglass*, 11 How. Prac. 193 (which quotes, on the computation of time, *Ex parte Dean*, 2 Cow. 605, and other New York cases, seemingly the other way, but explains the difference as in the text).

⁶¹ *Ege's Appeal*, 2 Watts, 283; *Menges v. Frick*, 73 Pa. St. 137; *McCulloch v. Hopper*, 47 N. J. Law, 189.

The first-named excuse (that of infancy) is everywhere retained;—though, of course, where persons become by law “adults” at a lesser age than that of 21 years, such age must be substituted for that named in the English statute.⁶²

The disability of coverture is still recognized in many states, which have given to married women the power to sue for the enforcement of their legal rights, or for the recovery of their “separate property,” without the assent of the husband. The “saving” in their favor has thus lost the only reason which formerly justified it.⁶³ But in the following states it has been abolished, along with its justifying cause: New Hampshire, New York, New Jersey, South Carolina, Florida, Ohio (only since 1887), Illinois, Wisconsin, Mississippi, Minnesota, Iowa, the Dakotas, Wyoming, Colorado, Washington. In Alabama, Montana, Idaho, the wife has the saving only when the husband is a necessary party; in Alabama and California, when the land in dispute is not separate estate. In Indiana, the Revision of 1881 has been construed as repealing it.⁶⁴

The disability of unsound mind has been retained in all the states. Insane persons sometimes live to become very old; and death is al-

⁶² See laws on age of adults, chapter 5, § 58, and note 334, to that section.

⁶³ That a procedure act enabling a married woman to sue alone does not abolish the saving of the coverture, is held in *State v. Troutman*, 72 N. C. 551. The saving belongs to a woman who, under a statute, may act as a feme sole by reason of her husband’s desertion. *Throckmorton v. Pence*, 121 Mo. 50, 25 S. W. 843. The act of James I. is in force in Maryland.

⁶⁴ See notes 32–37 to section 176. For New Jersey, see Revision of 1877, “Limitations,” § 17. For Indiana, see *Irey v. Markey*, 132 Ind. 546, 32 N. E. 309; *City of Indianapolis v. Patterson*, 112 Ind. 344, 14 N. E. 551; *Royse v. Turnbaugh*, 117 Ind. 539, 20 N. E. 485, and several other cases arising since 1881. In Georgia, the saving was abolished by the married woman’s act of 1868. *Boyd v. Hand*, 65 Ga. 468. In Mississippi, the constitution forbids all discrimination between men and women. In Texas, the constitution guarantees the saving for minors, the insane, and married women. In Virginia and in Alabama, suits for “separate estate,” which means the old fashioned separate estate in equity, are not within the saving. In California, Montana, and Idaho, the saving is given whenever the husband is a necessary party. In Arkansas, the disability was repealed by the act of 1873. *Garland Co. v. Gaines*, 47 Ark. 558, 2 S. W. 460. The disability imposed upon a married woman by the law of her domicile, or the powers which she has under it, cannot control the *lex rei sitae* as to land. *De Mares v. Gilpin*, 15 Colo. 76, 24 Pac. 568.

most the only end to the saving disability. Hence, a few states have named a limit beyond which the unsound mind of the dispossessed owner shall not be considered; such as 31 years in Mississippi, while in Minnesota and South Carolina the time of limitation cannot be extended more than five years by reason of unsoundness of mind or of imprisonment.⁶⁵ Feebleness of mind and body, which might be deemed sufficient, in a grantor or testator, to make his deed voidable or his will invalid, are not such unsoundness of mind, as will prevent the running of the statute, though it does not, by any means, follow that the ousted owner must have been found judicially of unsound mind before he or his heirs can claim the saving of the statute.⁶⁶

We come next to the saving known as "beyond the seas"; that is, out of the United States,—perhaps, out of the state. This "disability" comes through the claimant's own choice. It is apt to last while he lives. Travel and communication are now so rapid and cheap that one living anywhere, almost, can carry on a suit in an American court. In Maryland, Kansas, and Wyoming, the statute does not set forth the disabilities. The courts had to fall back on the act of James I. They have substituted for its words, "beyond the seas," absence from the United States.⁶⁷ Such absence is also recognized as a saving disability by the states of Rhode Island, Massachusetts, Maine, Tennessee; in Michigan, where it must not exceed 20 years in duration, and where plaintiff is only excused if he is

⁶⁵ Mississippi, Code, § 2734. See, *infra*, as to Minnesota and South Carolina.

⁶⁶ *Rugan v. Sabin*, 10 U. S. App. 519, 3 C. C. A. 578, 53 Fed. 415, relying on *Ex parte Barnesley*, 3 Ark. 168. The mental capacity, the lack of which is disability, laid down in *Warlick v. Plonk*, 103 N. C. 81, 9 S. E. 190, is clearly too high. See, also, *Asbury v. Fair*, 111 N. C. 251, 16 S. E. 467.

⁶⁷ *Bauman v. Grubbs*, 26 Ind. 419, supplies the meaning from section 797 of the Revised Statutes then in force (coverture, infancy, unsound mind, being in prison). In Kansas, *Case v. Frazier*, 31 Kan. 689, 3 Pac. 497, holds that the limitation in favor of a void tax deed does not run against a nonresident owner. There are no decisions as yet in Wyoming. In Nebraska it appears from sections 4543, 4553, of the Revision that, as to suits for land, absence from the state does not save from limitation. In the District of Columbia the replication of "beyond seas" is abolished by section 466 of the District Code. *Pickering v. Arrick*, 19 Wash. Law Rep. 707. See *Whitlock v. Walton*, 2 Mur. & P. Law Cas. (N. C.) 23, for American meaning of "beyond seas."

also absent from the British provinces of North America; in Illinois, only when absent from the United States on the business of the state or nation. The time of war is excluded in favor of an alien enemy by the laws of Vermont, New York, Kentucky, Missouri, Minnesota, Nevada, Idaho, Oregon and Washington.⁶⁸

The saving of imprisonment is not much met with in actual litigation, perhaps because landowners are not often imprisoned for crime. The saving in the English act was mainly intended in favor of those imprisoned for debt. Nearly all the American statutes, on the contrary, confine their aid to those imprisoned upon conviction for, or under accusation of, crime, or to those imprisoned upon conviction, at hard labor, for a term less than life.⁶⁹

The English statute saved the right of entry for ten years after the removal of disability, or after the death of the person resting under it; and such is at present the law in the states of Rhode Island, Maine, Massachusetts, New York, Pennsylvania, Delaware, Maryland, Ohio, and the Dakotas. In the following states the time of disability is "excluded"; in other words, after the removal of disability, the full time of the bar is allowed, which, in some of these states is ten years, in others, longer or shorter, as shown in the preceding section: Vermont, New Jersey, Virginia, Georgia, Florida, Mississippi, Nevada, Montana, Idaho, Washington, and Arizona. Shorter periods than ten years are given as follows: Seven years, in Texas; five years, in New Hampshire, Connecticut, Michigan, Wisconsin, West Virginia, also in California, where this is the regular bar; three years, in Kentucky, Missouri, Alabama, Arkansas; two years, in Indiana and Kansas; one year, in South Carolina, Iowa, Colorado, and Oregon.⁷⁰ In some states, the time of disability is

⁶⁸ Mich. St. § 8710.

⁶⁹ The clause of the New York Code of Civil Procedure (sections 322, 323) has been generally followed: "Imprisoned on a criminal charge, or in execution upon conviction of a criminal offense, for a term of less than for life." In Kentucky the time during which the true owner is held in the penitentiary is deducted, though the imprisonment begins after the title has accrued; it being on the footing of an exception, rather than of a disability.

⁷⁰ In Texas constitution of 1868 (art. 12, § 14) fixed the allowance of seven years after the removal of the disabilities of infancy, insanity, and coverture. See South Carolina Code Civ. Proc. § 108, for the involved wording, which brings out this result. The time to bring suits for dower in New York is gov-

to be "excluded," or is "not to be included," or "not to be a part of" the time of limitation. Such words are found in the statutes of New York and of Texas, but are so modified that the disability must exist when the right of entry first accrues, and the length of the bar, after disability removed, is shortened, thus rendering those words harmless.⁷¹ These turns of words are also found in the laws of Vermont, New Jersey, Virginia, Florida, Mississippi, Montana, Idaho, Arizona, and Nevada; but in these states, and we suppose everywhere except in Georgia, the running of the statute is never suspended when the person to whom the right first accrues is at the time free from disability; and the statutes of New York, North and South Carolina, Tennessee, and Alabama, Minnesota, Missouri, and Arkansas, the Dakotas, Idaho, and Nevada, Oregon, and Washington provide carefully to the contrary.⁷²

erned by Code Civ. Proc. § 1589, under which the time of infancy or insanity is not to be counted.

⁷¹ New York, Code Civ. Proc. §§ 375 and 408 (the latter very explicit), embodying the decision in *Wynkoop v. Demarest*, 3 Johns. Ch. 129, and the English precedent of *Doe v. Jesson*, 6 East, 80; South Carolina, Code Civ. Proc. § 108; North Carolina, §§ 169, 170 (which are in apparent conflict with section 149 in same Code); and passages in the Codes or Revisions of Tennessee, Alabama, Minnesota, the Dakotas, Missouri, Arkansas, Nevada, Idaho, California, Oregon, Washington. The words "his right accrues" do not, in terms, exclude a saving to the infant heir of an adult ancestor; and the words "first descends" rather favor it; but section 408 of the New York Code sets them aright. In Kentucky, section 2507, St. 1894, is very plain against any new saving of an infant heir.

⁷² *Pim v. City of St. Louis*, 122 Mo. 654, 27 S. W. 525; *Wilkinson v. St. Louis Sectional Dock Co.*, 102 Mo. 130, 14 S. W. 177; *Walden v. Heirs of Gratz*, 1 Wheat. 296 (following *Durore v. Jones*, 4 Term R. 398, and *Cotterell v. Dutton*, 4 Taunt. 828); *Bush v. Bradley*, 4 Day, 307; *Peck v. Randall*, 1 Johns. 175; *Hall v. Vandergrift*, 3 Bin. 374; *Fitzhugh v. Anderson*, 2 Hem. & M. 306; *Anderson v. Mulford*, 1 Hayw. (N. C.) 322; *Smith v. Roberts*, 62 Ala. 83; *Johnson v. Schumacher*, 72 Tex. 334, 12 S. W. 207 (where the saving was claimed by a grantee under disability); *Hardy v. Riddle*, 24 Neb. 670, 39 N. E. 841; *Grether v. Clark*, 75 Iowa, 383, 39 N. W. 655 (construing Code, § 2535). In South Carolina, after alternating decisions, an act of 1824 allowed the time of disability in the heir to be deducted; but section 108, Code Civ. Proc., restores the general rule, with the addition that insanity or imprisonment cannot lengthen the bar by more than five years, and no disability for over one year after its removal. In *Williams v. First Pres. Soc.*, 1 Ohio St. 478, the rule of the text is applied to laches in equity. *Chancy v. Powell*, 103 N. C.

In Georgia, on the contrary, the law directs that, though prescription has begun, it shall cease against persons under disability, but that, after the removal thereof, the later possession shall be tacked to the former; in other words, the time of the disability is deducted from the whole time which may elapse between the accrual of the right and the bringing of the action.⁷³

As to other states it is clear that, if the person to whom the right of action accrues is ever freed from all disability, and the 10 years or other period allowed after removal has begun to run, a new disability arising thereafter cannot stop the running of this period.⁷⁴

But there has been a struggle in several states on behalf of supervening and of cumulative disabilities. "Supervening" takes place when a person, at the time of the accrual of the right, is under one disability, and, before the removal of this, falls under another which outlasts the first. The most frequent instance is that of a girl, to whom land passes by the death of an ancestor or devisor, who thereafter, and while still under age, marries; but it may be an infant, or a married woman, who, after the accrual of the right, becomes insane, and whose insanity outlasts infancy or coverture. Early cases in Connecticut, Kentucky, and Tennessee sustained the saving force of the supervening disability; but they were all overruled, and the law in these, as in all other states, clearly disallows them, except in North Carolina, where the decisions in favor of the continued saving have stood their ground and have been embodied in the statute.⁷⁵

159, 9 S. E. 298; *Bender v. Bean*, 52 Ark. 132, 12 S. W. 180, 241 (rule applied to minor's right of redemption from tax sale); Virginia, Code, § 2918; West Virginia, c. 104, § 5; Massachusetts, c. 196, § 7 (time cannot be extended on account of the disability of any person except that to whom the right first accrues).

⁷³ Georgia, Code, § 2687. Where land was devised to executors to sell, the minority of the beneficiaries did not stop the running of the bar. *Sparks v. Roberts*, 65 Ga. 571. Compare *supra*, section 176, note 53.

⁷⁴ *Clark v. Trail*, 1 Metc. (Ky.) 35 (case of a lunatic recovering his mind and relapsing).

⁷⁵ For general disallowance, see *Stowell v. Lord Zouch*, 1 Plowd. 353; *Demarest v. Wynkoop*, 3 Johns. Ch. 129; *Cotterell v. Dutton*, 4 Taunt. 826; *Tolson v. Kaye*, 3 Brod. & B. 217; and *M'Farland v. Stone*, 17 Vt. 165; *Eaton v. Sanford*, 2 Day, 523 (overruled in *Bunce v. Wolcott*, 2 Conn. 27); *Crozier v. Gano*, 1 Bibb, 259 (detinue), overruled in *Duckett v. Crider*, 11 B. Mon. 188 (1362).

A cumulative disability is that of heirs (or, possibly, of devisees) to whom the right passes from an ancestor against whom, by reason of disability, the statute has never commenced to run. It is not allowed to avail under the English authorities, as the word "death," in the disability clause of the statute of James I., clearly excludes it. It was done away with in Connecticut, along with the supervening disability; but the early North Carolina decision in favor of "cumulating" has never been rescinded in that state and seems to be recognized by the present statute.⁷⁶

When a right of entry falls in undivided shares on several persons, as joint tenants, parceners, or tenants in common, some of whom are under disability, while others are free from it, and when all are under disabilities which are removed at different times, troublesome questions arise.⁷⁷ At common law joint tenants or parceners are "one in estate." They had to join in real actions. It was against the spirit of the law that one should retain his right of entry, and another lose it. Hence, when the right of entry came to co devisees or coheirs, some courts concluded that there should be no saving unless all were within it (though if all were within it the time must run out against all);⁷⁸ while the courts of North Carolina, South Car- (detinue); *Wilson v. Kincannon*, 4 Hayw. (Tenn.) 182 (overruled by McDonald v. Johns, 4 Yerg. 258); *Davis v. Cooke*, 3 Hawks, 608, is not overruled, and is now law. North Carolina, Code, § 149. Recent cases against the doctrine are *Ragsdale v. Barnes*, 68 Tex. 504, 5 S. W. 68; *Smith v. Powell*, 5 Tex. Civ. App. 373, 23 S. W. 1109.

⁷⁶ *Eaton v. Sanford*, *supra*, is discredited as to both points. The present Connecticut statute gives five years to the heirs, without regard to their condition. *Doe d. Gilliam v. Jacocks*, 4 Hawks, 310, in North Carolina, seems still good law. Code, § 149, is headed "Cumulative," etc., though the body of the section speaks only of supervening disabilities.

⁷⁷ Only 10 years for heirs of ancestor dying under disability, though they also labor under disability. New York, Code Civ. Proc. § 375; *Carpenter v. Schermerhorn*, 2 Barb. Ch. 323. Similar cases may be found in almost every state outside of North Carolina and Georgia.

⁷⁸ In Kentucky, under the act of 1796, in force till 1852, it was held, mainly on the strength of the words "person or persons," that if the right accrues to cotenants, who are all under disability, they are all protected till the bar in favor of the youngest runs out; but if some, when the right accrues, are *sui juris*, the statute runs against all. *Clay's Heirs v. Miller*, 3 T. B. Mon. 146, and other cases. On these precedents it was held, under Rev. St. 1852 (the words of which are still the law), in *Moore v. Calvert*, 6 Bush, 356, that

olina, and perhaps some other Southern states, allow the disability of one parcener or joint tenant to stop the statute from running against any.⁷⁹

Since joint tenancy, except among executors and trustees is done away with to a great extent, and coheirs in most states are no longer parceners, the difficulty is best solved by letting the right of each tenant in common (as a joint owner is likely to be) stand on its own merits; that is, the share belonging to each will be recoverable, if its owner is within the saving, or will be lost by limitation if its owner is not within it or if the extra time allowed to him has expired. Such is the law in Texas, and, practically, in Georgia, where the bar "against a joint title" is only suspended "when it cannot be severally enforced" by the owners under disability;⁸⁰ and such it the youngest coparcener (all of them infants) saves the oldest. The case of some of the cotenants free from disability when the title accrues has not come up since 1852. In Tennessee (1833) *Shute v. Wade*, 5 Yerg. 1 (trover for slaves), the Kentucky doctrine was affirmed, and followed in *Seay v. Bacon*, 4 Sneed, 102, etc. *Masterson v. Dunn*, 30 Miss. 264 (detinue for slave), followed the Kentucky and Tennessee precedents. In *Riggs v. Dooley*, 7 B. Mon. 240, the Kentucky court of appeals intimated strongly that, among tenants in common, each would stand on his own rights as to saving disabilities, though it had been held in *Ward's Heirs v. Harrison*, 3 Bibb, 306, that one parcener can also demise her share and therefore lay a several demise in an ejectment. In the case of *Van Bever v. Van Bever* (Ky.) 30 S. W. 983, there is a strong dictum to the effect that the disability of one joint owner stops the statute as to all, which is to be hoped will not be followed in a case making the decision of the question material.

⁷⁹ In South Carolina, one saves all. *Faysoux v. Prather* (1818) 1 Nott & McC. 298; *Lahiffe v. Smart*, 1 Bailey, 192; *McGee v. Hall* (1887) 26 S. C. 179, 1 S. E. 711; *Reeves v. Brayton*, 36 S. C. 384, 15 S. E. 658. *Sanford v. Button*, 4 Day, 311, is probably obsolete as to Connecticut. Some early cases, quoted by Freeman on Cotenants (section 375), where one infant saved the joint right of appeal to his adult cotitigants, have not been extended to the saving of cotenants of land in the states in which they were decided. In *McRee v. Alexander*, 1 Dev. (N. C.) 321, the minority of one coheir when the title accrued saved the rights of all. By reference to sections on "Joint Owners," and, in chapter on "Titles by Descent," to section on "Descendants," it will be seen how far joint tenants (though without survivorship) and coparceners are still recognized. We cannot say, however, that the rulings on the saving power of the disabilities of one part owner have always followed the distinction between tenants in common and joint tenants or coparceners.

⁸⁰ *Tewis v. Collier*, 84 Tex. 638, 19 S. W. 801 (seems to be the settled law (1364)

is in Vermont, Connecticut, Ohio, California, and probably in most other states.⁸¹

In New York, the words of the statute have been carefully chosen to lead to this result. Coheirs are made tenants in common. Joint tenancies can be created by deed or will only by express words. Hence, the joint owners of the right of entry are always, or nearly always, tenants in common, each of them can sue for his own share, and as the saving is given by the law of procedure "if a person who might maintain an action," etc., "is within the age of twenty one, or insane, or imprisoned," it follows that each one is barred as to his or her share, according to his own personal rights.⁸²

Title may often depend upon delay in bringing a suit not at all in the nature of an ejectment, and which is governed by special laws. For instance, a suit to set a deed aside, as a fraud upon creditors or as a preference in contemplation of insolvency. The statute fixing a time within which such a suit may be instituted does not always (as to suits of the last-named kind, never) allow any further delay by reason of the plaintiff's disability. In such a case the court cannot relieve against the lapse of time, no matter how utterly unable the plaintiff may have been to act more speedily. The court cannot interpolate either disabilities or exceptions.⁸³

of Texas that each share stands on its own bottom); *Pendergrast v. Gullatt*, 10 Ga. 218.

⁸¹ *Bryan v. Hinman*, 5 Day, 211, 218; *arguendo*, *Williams v. Sutton*, 43 Cal. 65, 73; *McFarland v. Stone*, 17 Vt. 165 (heirs being tenants in common, and though administrators sued for their benefit); *Williams v. First Presbyterian Soc.*, 1 Ohio St. 478 (applied to laches in equity).

⁸² See 4 Kent, Comm. 361, 367; also, chapter 3, § 27, and chapter 4, § 33. as to joint tenants and coparceners, showing similar laws in many states, while in other states joint tenancies remain, and only the incident of survivorship is abolished. In *Bradstreet v. Clarke*, 12 Wend. 602, though the remedy was a writ of right, the proposition in the text is treated as a matter of course.

⁸³ *Way v. Hooton*, 156 Pa. St. 8, 26 Atl. 784 (under a Pennsylvania act of 1856, allowing 10 years for the enforcement of a resulting trust); *Miller v. Franciscus*, 40 Pa. St. 335; *Beckford v. Wade*, 17 Ves. 94. See, also, next section, under "Absolute Limit."

§ 178. Exceptions and the Absolute Limit.

There are other causes besides the claimant's disability which may prevent or suspend the running of the statute; but they are of much less frequency and importance. One of these—the suspension of all limitations during the progress of the Civil War, and until the lately seceded states were fully rehabilitated—has lost its practical bearing, and we may hope that there will be no occasion to call the decisions on this subject into precedent hereafter;⁸⁴ but there are some reported decisions of late date.⁸⁵ Another ground of exceptions, but, happily, only in a very few states, is the defendant's absence from the state in which the land lies, or, at least, his nonresidence in the state. Such a provision is very natural in personal actions, but it is needless in suits for the recovery of land; for there can be no such suit unless the land be in possession of some person who must be bodily upon it or near to it; and, if such person be not the owner, but his tenant or servant, a summons naming the owner may be served on such person with effect, or he might be made a defendant in his own name in the ejectment suit, and the possession be recovered therein. Yet, it is clear that, in Iowa and Minnesota, the nonresident possessor of land, though he have his tenant or his servants upon it, cannot gain a title by the effect of the limitation law.⁸⁶ The New York Code also excludes the

⁸⁴ For Alabama, see *Anderson v. Melear*, 56 Ala. 621; North Carolina, Code, § 137 (May 20, 1861, to January 1, 1870); Tennessee, Code, § 3457 (May 6, 1861, to January 1, 1867).

⁸⁵ Virginia, Code, § 2919. See *Virginia Min. & I. Co. v. Hoover*, 82 Va. 449; *Davis v. Tebbs*, 81 Va. 600; *Tunstall's Adm'r v. Withers*, 86 Va. 892, 11 S. E. 565.

⁸⁶ *Heaton v. Fryberger*, 38 Iowa, 185; *Clinton Co. v. Cox*, 37 Iowa, 570 (under a section of a prior revision, which is the same as section 2533 of the present one; the time of the nonresidence of the defendant shall not be included); *Parsons v. Noggle*, 23 Minn. 328 (under Gen. St. Minn. c. 66, § 15). These laws remind one of the savage maxim of the oldest Roman law, quoted by Cicero (*De Officiis*): "Contra hostem æterna auctoritas" (against a foreigner the right of action is perpetual). And to treat the citizen of another state thus as a foreigner is hardly in keeping with the spirit of the constitution of the United States. It was held in a late Minnesota case that the sojourn of a citizen at Washington where he represents the state

time during which a person against whom an action accrues is without the state next after its accrual, or his absence thereafter for more than one year at a time, or the time he lives in the state under an assumed name, without the knowledge of the party having the right; and there are similar statutes, more concisely worded (absent, absconding, or concealed), in Ohio and Kansas; also in Alabama, Arkansas, California, Oregon, Washington, Arizona, and Oklahoma. The corresponding clause in Nebraska has been held not to prevent the bar from running in favor of the title to land; and that in the Indiana statutes seems to refer only to personal actions.⁸⁷ In Kansas not only the bar of limitation has been refused to the non-resident holder of a void tax or sheriff's deed, who had his tenant on the land; but the resident grantee of a mortgagor who had left the state was not allowed to plead limitations against the enforcement of the mortgage.⁸⁸

A provision has been taken from the old English statute and adopted in many states, which grants additional time (generally one year; in Georgia, only six months) after the termination of an action which has been brought within due time, but the judgment therein has been reversed, on error or appeal, without the award of a new trial, or the action is terminated by arrest of judgment, or other-

in congress is not such absence as robs him of the benefit of limitations. *Kerwin v. Sabin*, 50 Minn. 320, 52 N. W. 642. In *Fosgate v. Herkimer Manuf'g & Hydraulic Co.*, 12 N. Y. 580, it is said that the bodily occupant is the most proper party in an action of ejectment; and in *Sutton v. Casselleggi*, 77 Mo. 397, the occupant is said to be the only necessary party.

⁸⁷ New York, Code Civ. Proc. § 401; Ohio, § 4989, and sections elsewhere, near those cited heretofore. *Frey v. Aultman*, 30 Kan. 181, 2 Pac. 168 (concealment means within the state; not a land suit); *Chicago, K. & N. Ry. Co. v. Cook*, 43 Kan. 83, 22 Pac. 988 (though the defendant have tenants on the land). The Nebraska law does not affect suits for land, or even prolong the lien of a mortgage. *Merriam v. Goodlett*, 36 Neb. 384, 54 N. W. 686; *Lantry v. Parker*, 37 Neb. 353, 55 N. W. 962. In Oklahoma (section 5162), the time of the defendant's nonresidence is excluded. In Texas, the time when the defendant is "absent from the state, beyond the seas, or elsewhere" is not to be counted. Rev. St. art. 3216.

⁸⁸ *Case v. Frazier*, 31 Kan. 689, 3 Pac. 497; *Walker v. Boh*, 32 Kan. 358, 4 Pac. 272; *Morrell v. Ingle*, 23 Kan. 32; *Waterson v. Kirkwood*, 17 Kan. 9; *Chicago, K. & N. Ry. Co. v. Cook*, 43 Kan. 83, 22 Pac. 988.

wise than by the plaintiff's neglect to prosecute,—though, in North Carolina, such fresh time is granted, even after a nonsuit, and "from time to time"; in Georgia, expressly, only "for one time." This liberty has been very sparingly used; and, as reversals without a *venire de novo*, or which do not otherwise fully dispose of the merits, are rare in modern practice, the provision does not often come into play.⁸⁹ In the spirit of these statutes, it has been two or more times held in Tennessee, with its very short bar, that, where an ejectment bill has been dismissed on the ground of the complainant's case being of common-law jurisdiction, the defendant will be restrained from setting up the time spent in the chancery suit as a part of the period of limitation.⁹⁰ A statute also, in many states, excludes from the bar of limitation, in any action at law, the time during which the claimant was enjoined from bringing such action, on the double ground that the party which obtained the injunction wrongfully

⁸⁹ New York, Code Civ. Proc. § 405, etc.; Georgia, Code, § 2688 (dismissal or nonsuit for one time), etc. Such a clause does not aid a suit for ground rents. *Wallace v. Fourth United Presbyterian Church*, 152 Pa. St. 258, 25 Atl. 520. *Lang v. Fatheree*, 7 Smedes & M. 404, and *Keener v. Goodson*, 89 N. C. 273 (in both it was remarked that these provisions can never shorten the bar, but can only lengthen it); *Jones v. Bivins*, 56 Ga. 538 (motion to quash an execution sale is not a previous suit); *Hill v. Huckabee*, 70 Ala. 183 (though the reversal does not require a dismissal); *Long v. Orrell*, 13 Ired. 123 (though another tenant meanwhile comes into possession). In Alabama, a reversal of a decree in equity is not held within the exception. *Roland v. Logan*, 18 Ala. 307; *Morrison v. Stevenson*, 69 Ala. 448. A voluntary dismissal is not a "failure of the action," within the Ohio law. *Siegfried v. New York, L. E. & W. R. Co.*, 50 Ohio St. 294, 34 N. E. 331. In *Hobbs v. Spencer*, 49 Kan. 769, 31 Pac. 702, the exception was applied to a suit on a mechanic's lien, which seems rather contrary to the spirit of such lien laws. The voluntary dismissal of a creditor's suit held fatal, in *Dabney v. Shelton*, 82 Va. 349. In North Carolina, under the old practice, limitation did not bar the action of ejectment, but the right of entry; hence this exception did not apply to actions for land (*Morrison v. Connelly*, 2 Dev. 233); but section 166 of the Code clearly does apply. See it applied to a mortgage, in *Williams v. Kerr*, 113 N. C. 306, 18 S. E. 501. On a double appeal, the year counts from the affirmal of the reversal. *Wooster v. Forty-Second St. & G. S. F. R. Co.*, 71 N. Y. 471. The second suit must be against the same parties as the first; hence it cannot be brought, where there was a lack of parties in that. *Hughes v. Brown*, 88 Tenn. 578, 13 S. W. 286.

⁹⁰ *Love v. White*, 4 Hayw. (Tenn.) 210; *Chilton v. Scruggs*, 5 Lea, 308, 313. (136S)

must not be allowed to profit by his own wrong, and the further ground, "Actus curiae nemini facit injuriam."⁹¹

The death of the claimant is generally made a ground for extending the time for bringing personal actions, as the personal representative must first be appointed and qualified, and must also become acquainted with the assets of the estate. The same reason does not apply to actions for land, as the right to bring these passes, in most states, to the heir or devisee—at least, at law—at the very moment of the testator's death. We have seen that some states (e. g. Georgia, New Hampshire, and Michigan) have gone very far towards making land assets in the hands of the administrator, and we need, therefore, not wonder that some states have given the same extension of time on the death of a claimant of land as upon the death of a creditor.

The statutes have not all been drawn with regard to these distinctions. Thus, in Michigan, the delay allowed for the death of either party is made to apply only to personal actions.⁹²

A few states have an ultimate limit beyond which neither exceptions nor disabilities can save the right of action. The laws enacted are worded differently, and may bear different meanings. In Maine the right is in all cases barred in 40 years.⁹³ In New Jersey an act of 1887 names 60 years as the utmost limit, after which an "actual possession" is not to be disturbed; while another section of the act names 30 years, but it calls for certain formalities, and allows disabilities to lengthen the period, so as to make this clause useless. It does not seem that even the 60 years' possession, if held during an outstanding life estate, would bar those in remainder.⁹⁴ The

⁹¹ New York, Code Civ. Proc. § 406, etc. The blending of law and equity in the same cause, under all the modern "Codes," has made this provision comparatively needless. At best, injunctions are much oftener granted against the enforcement of a judgment than against the beginning of an action. In the United States courts, which do not allow an equitable defense in an ejectment, these provisions are still very important.

⁹² Michigan, How. Ann. St. § 8722. For Georgia, see Cofer v. Flanagan, 1 Kelly, 538; Conyers v. Kennon, Id. 379. The New Hampshire limitation law (chapter 217) has no exception of the kind referred to.

⁹³ Maine, St. c. 105, § 15.

⁹⁴ Wright v. Scott, 4 Wash. C. C. 16, Fed. Cas. No. 18,092, only decides that limitation which begins to run against a tenant in tail runs on against

same may be said of the Pennsylvania act, under which no disability must extend the length of the bar beyond 30 years. But the Pennsylvania act of 1855 for the better securing of titles cuts off all ground rents and all annuities charged upon land in 20 years from the time when payment has ceased; and this, not only without reference to disabilities, but also as against reversioners and remainder-men, though life estates were outstanding.⁹⁵ In Virginia and West Virginia, the period cannot be extended by any saving beyond 20 years from the time the right first accrued.⁹⁶ In Kentucky "the period shall not be extended beyond 30 years from the time (when it first accrued) by reason of any death, or the existence or continuance of any disability"; and this clause has been given perhaps a wider application than naturally belongs to it.⁹⁷ In Missouri the time cannot be extended by disabilities beyond 24 years, and in Alabama not over 20 years. This time is allowed after the right of action accrues.⁹⁸ In South Carolina, as against a person in possession under claim of title by virtue of a written instrument, the plain-

the issue in tail. Whether the 60-year limitation would run against a remainder-man is left undecided.

⁹⁵ Pennsylvania, Brightly, Purd. Dig. "Limitations," 13. The older act, section 8 of the chapter, is obsolete. The 30 years is applied like the shorter bar, i. e. the remainder-man has his own 30 years. *Pratt v. Eby*, 67 Pa. St. 396; *Hunt v. Wall*, 75 Pa. St. 413; *Hogg v. Ashman*, 83 Pa. St. 80; *Ege v. Medlar*, 82 Pa. St. 86. As to ground rents, etc., see *Wallace v. Fourth United Presbyterian Church*, 152 Pa. St. 258, 25 Atl. 520; *In re Meek's Estate*, 161 Pa. St. 360, 29 Atl. 41.

⁹⁶ Virginia, Code, § 2918; West Virginia, Code, c. 104, § 4.

⁹⁷ Kentucky, St. 1894, § 2508. The writer has, in his Kentucky Jurisprudence, expressed his dissent from the court of appeals which counted the 30 years from the time at which the husband and wife made a void conveyance of her estate, before the married woman's act of 1846, i. e. when such a deed passed an estate for his life. This was done in *Medlock v. Suter*, 80 Ky. 101; *Mantle v. Beal*, 82 Ky. 122; *Bradley v. Burgess*, 87 Ky. 648, 10 S. W. 5. But, as deeds so old will not often come up hereafter, the error of construing "disability" as if it meant the wife's inability to convey can do little harm hereafter. Aside of such cases, i. e. where the person under disability has made an attempt to convey, the 30 years' bar is not counted against the reversioners, otherwise than the common bar. *Butler v. McMillan*, 88 Ky. 414, 11 S. W. 362.

⁹⁸ Missouri, Rev. St. § 6767; Alabama, Civ. Code, § 2624; *McElhinney v. Ficks*, 61 Mo. 329, seems to extend this bar to the state.

tiff or those under whom he claims, must have been in actual possession of the land, or of part thereof, within 40 years.⁹⁹ In Florida an adverse possession of 30 years confers a title even against persons under disabilities.¹⁰⁰ In Tennessee, though there is no absolute period for all cases, a maximum term of 20 years is prescribed, after which time, counted from the beginning of adverse possession, a married woman or her heirs can no longer bring suit against one who has for consideration and in good faith bought her land, and holds the deed of husband and wife, or against those claiming under him, by reason of any defects in the acknowledgment of such deed.¹⁰¹ In Alabama a lapse of 20 years cuts off all savings for disability; but it does not bar estates in reversion or remainder until the limitation has run from the accrual of the right.¹⁰² Oregon must also be mentioned here, as the disabilities named in its statute can never extend the time by more than 5 years. There is thus a limit of 15 years, but the exception against absent defendants is not thereby defeated.¹⁰³ Missouri has, moreover, since 1874, introduced another limitation (then retrospective only, but which has since been made prospective also), when the following five conditions concur: (1) The equitable title, at least (*a fortiori* the legal), has been out of the United States for 10 years before action brought; (2) for 30 years the plaintiff and those under whom he claims have neither been in possession, nor paid any taxes; (3) one year has elapsed since the statute; (4) the occupant's possession is lawful, and has been continuous for one year; (5) the claimant has, under these conditions, not brought suit within a year. Another section of the Revised Statutes seems to reduce the 30 years to 20, perhaps—but it is not quite apparent—under otherwise less favorable conditions. The remainder-man or reversioner evidently has one year to sue in; but disabilities do not save from the operation of these acts.¹⁰⁴ Maine

⁹⁹ South Carolina, Code Civ. Proc. § 109.

¹⁰⁰ Florida, § 1292.

¹⁰¹ Tennessee, St. § 3463.

¹⁰² Alabama, Civ. Code, § 2624; *Bass v. Bass*, 88 Ala. 408, 7 South. 243.

¹⁰³ Oregon, Code, § 17; *Mitchell v. Campbell*, 19 Or. 198, 24 Pac. 455.

¹⁰⁴ Missouri, Rev. St. § 6770, same as section 3225 in former Revision, and section 6771; *Fairbanks v. Long*, 91 Mo. 628, 4 S. W. 499; *Rollins v. McIntire*, 87 Mo. 496 (an act of 1874); *Mansfield v. Pollock*, 74 Mo. 185 (what possession lawful).

at one time passed an act barring all actions for land after adverse and exclusive possession of 40 years. The language was: "No such action shall be brought or maintained," being evidently aimed at actions already pending, and particularly at one just brought by a remainder-man coming to his right of entry by the death of successive life tenants, 63 years after the death of his great-grandfather, under whose will he took. It was quite clear that the act was intended to cut off remainder-men, though they never had had an opportunity to sue. The supreme court of the United States came to the conclusion that a law attempting to take away a right of entry then existing and actually asserted by action was void, under the constitution of Maine.¹⁰⁵

§ 179. Nullum Tempus.

The English statutes of limitation enacted before the settlement of the colonies, and the colonial laws as they stood at the time of the Revolution, did "not bind the king." The theory was that, while a private person might and should lose his rights by sleeping over them ("vigilantibus non dormientibus succurrunt leges"), the king, representing the whole people, can only act through officers and agents; and there is no justice in the whole people losing a part of their property, through the neglect of these agents, perhaps through their willful connivance with the trespassers on the public domain. Hence the maxim: "Nullum tempus occurrit regi."¹⁰⁶ The enforcement of the rule must sometimes lead to oppression, and always to insecurity; hence it was at an early date tempered by the fiction of presuming a grant from the crown after a very long possession, with

¹⁰⁵ Webster v. Cooper, 14 How. 488 (there was no 14th amendment then, and the 5th is only a limitation on congress).

¹⁰⁶ The maxim is recognized in Knight v. Leary, 54 Wis. 459, 11 N. W. 600, Jones v. Walker, 47 Ala. 176, Doran v. Central Pac. R. Co., 24 Cal. 245, both in favor of the United States and of a state; also in Levasser v. Washburn, 11 Grat. 576; People v. Gilbert, 18 Johns. 227; U. S. v. Kirkpatrick, 9 Wheat. 735 (arguendo); Gibson v. Chouteau, 13 Wall. 92 (for the purpose shown infra); lately in Virginia, as to the title in oyster beds (Hurst v. Dulany, 84 Va. 701, 5 S. E. 802); Kellogg v. Decatur Co., 38 Iowa, 524 (as to taxes); Miller v. State, 38 Ala. 601 (but since allowed, see infra).

the restriction, however, that such a grant cannot be presumed when a law expressly forbids the issual thereof.¹⁰⁷

In general, as will be seen hereafter, the rule still prevails so far in favor of the United States, as well as the states, that one who, without compliance with the land laws, settles upon the vacant lands of either, is looked upon as a "squatter" whose possession is not counted under the statute of limitations until a patent issues to some one else; for the crown or the commonwealth cannot be "disseised." A squatter's possession is that of the crown or commonwealth.¹⁰⁸ The United States have done nothing by their own legislation to relax this principle; but we have seen already that in some of the states one who has complied so far with the United States land laws as to be entitled to his patent on demand without further payment is so far the owner that the statute runs against him in favor of a squatter.¹⁰⁹

Many of the states have regulated the matter by definite laws,

¹⁰⁷ *Goodtitle v. Baldwin*, 11 East, 488. In England, an act of 9 Geo. III. c. 16, introduced a limitation of 60 years against the crown.

¹⁰⁸ *Higginbotham v. Fishback*, 1 A. K. Marsh. 506 ("as plaintiff's patent is not 20 years old, there can be no limitation"). *Hall v. Webb*, 21 W. Va. 318; *Montgomery v. Gunther*, 81 Tex. 320, 16 S. W. 1073. In Virginia and West Virginia, this rule is extended to land forfeited to the commonwealth for delinquent taxes. *Levasser v. Washburn*, *supra*; *Armstrong v. Morrill*, 14 Wall. 120; *Koiner v. Rankin*, 11 Grat. 420. This principle is declared in New York and in North Carolina, by fixing in the statute the same limitation against the state and against a patentee from the state (see *infra*), i. e. after an adverse holding for 40 years; and a like exception is made in California, South Carolina, and the Dakotas. See, *infra*, length of bar against state. In Florida, the rule laid down as above by the courts is declared by statute (section 1284). *Gibson v. Chouteau*, *supra*, is to same effect, and is followed in Missouri in *Gibson v. Chouteau*, 50 Mo. 85, *Smith v. Madison*, 67 Mo. 694 (which turned on the question whether the Spanish grant of 1797 was complete, or whether it left the fee in the United States). But see, as to Missouri, *supra*, section 178, note 98. Counts from sealing of patent. *Hammond v. Johnston*, 93 Mo. 198, 220, 6 S. W. 83.

¹⁰⁹ See note 45 to section 176; *Hargis v. Inhabitants of Congressional Tp.*, 29 Ind. 70. But, under the laws of the United States giving homesteads to actual settlers, the title is not good, in equity even, till completed, as the assignment of the homestead is against the policy of the law. *Nichols v. Council*, 51 Ark. 26, 9 S. W. 305. For the principle, see *Lindsey v. Miller's Lessee*, 6 Pet. 666.

naming the number of years after which "the people" or "the commonwealth" will not bring suit for the recovery of land; making it longer than the period which would bar a natural person. The time thus fixed is 40 years in New York (for the state or its patentee), Wisconsin, and in the Dakotas; but in the two latter states the state or its grantee has only 20 years in which to sue after its patent has been declared void. For fraud, also, the people of New York must sue within 20 years.¹¹⁰ Thirty years in North Carolina, but only 21 years where the defendant's possession has begun under color of title corresponding to the 7-years limitation by which those who have such a possession may bar an individual owner.¹¹¹ Twenty years in Michigan, South Carolina, and Alabama, which privilege is in the last-named state shared by the school authorities holding the "sixteenth section," and by every school district.¹¹² Ten years in California, Idaho, and Nevada,—only five years after a grant is adjudged void.¹¹³ In Maine and Massachusetts (except as to lands below high-water mark, the back bay lands of Boston and Provincetown), in New Jersey, in Delaware (except as to salt marshes, beach, and shore), in West Virginia, Kentucky, Minnesota, Oregon, and Washington,—the ordinary length of time bars the commonwealth as well as an individual. The lands above excepted are deemed inalienable and imprescriptible.¹¹⁴

¹¹⁰ New York, Code Civ. Proc. § 362; Wisconsin, St. § 4229; Dakota Territory, Code Civ. Proc. § 38. Where a possession of nearly the last 40 years is proved, also one a very long time ago, continuity may be presumed. *People v. Trinity Church*, 22 N. Y. 44. That the people must have had perception of profits within 40 years is treated as an idle phrase. *People v. Arnold*, 4 N. Y. 508.

¹¹¹ North Carolina, Code. § 139.

¹¹² South Carolina, Code Civ. Proc. §§ 95, 97; Michigan, § 8708; Alabama, Civ. Code, § 2613. Thus, a tax bid made by the state becomes worthless if possession is not taken or sued for in 20 years. *Chamberlain v. Ahrens*, 55 Mich. 111, 20 N. W. 814.

¹¹³ California, Code Civ. Proc. § 315; Idaho, § 4035; Nevada, § 3631.

¹¹⁴ Maine, c. 105, § 11; Massachusetts, Pub. St. c. 196, § 11. The land gained by partly draining a public pond is within the limitation. *Attorney General v. Revere Copper Co.*, 152 Mass. 444, 25 N. E. 605; New Jersey, "Limitations," § 20; Delaware, c. 2, § 2; West Virginia ("unless otherwise expressly provided"), c. 35, § 20 (see *State v. Mines*, 38 W. Va. 125, 18 S. E. 470; *Teass v. City of St. Albans*, 38 W. Va. 21, 17 S. E. 400); Kentucky,

In Vermont, Georgia, Florida, Indiana, Tennessee, Mississippi, Missouri, Texas, and Arizona there is no bar of limitation against the state, and in Colorado none against the United States, unless the land be "held according to law."¹¹⁵

In New York and in the Dakotas the state or its grantee has, moreover, 20 years, in South Carolina 10 years, in California 10 years, after a patent for the land possessed has been adjudged to be void,—in the full wording of the New York Code: "On an allegation of a fraudulent suggestion or concealment, or of a forfeiture, or mistake, or ignorance," etc. An ejectment suit is brought to execute this judgment, and must be begun within a shorter time than that in which "the people" or state might sue otherwise.¹¹⁶

Where a city, town, county, or school district owns land, not for direct use for its governmental functions, but simply as an investment (such as the school lands in the new states), the rule as laid down by most American courts is that the ordinary limitation runs in favor of the possessor; that the municipal body does not enjoy the prerogative of *nullum tempus*, or of the longer limitation.¹¹⁷

On the other hand, in Mississippi, the very constitution frees not only the state, but all its municipalities or political divisions, from the effect of prescription, and this clause takes effect on all limitations that had only in part run out when the constitution of 1890 took effect, but not where the limitation had run out fully. The law in Florida also exempts school districts and school funds; the laws of Vermont and of Missouri all lands that are given to public, pious, or charitable uses; and in New Hampshire no adverse possession, by fencing up or otherwise, can defeat the title to any school lot, church lot, or public grounds.¹¹⁸

St. 1894, § 2514; Minnesota, c. 66, § 12; Oregon, c. 1, § 13. In Washington (see section 122) every limitation applies to state or county.

¹¹⁵ Vermont, § 954; Georgia, Code, § 2682; Florida, § 1283; Indiana, § 304; Tennessee, Code, § 3456; Mississippi, § 2736; Missouri, § 6772 (there was an act in 1857 allowing the bar in ejectment against the state; repealed in 1865); Texas, Rev. St. art. 3200; Arizona, § 2306.

¹¹⁶ New York, Code Civ. Proc. § 364; Dakota Territory, Code Civ. Proc. § 40; South Carolina, Code Civ. Proc. § 95; California, Code Civ. Proc. § 315.

¹¹⁷ *May v. School Dist.*, 22 Neb. 205, 34 N. W. 377; *City of Bedford v. Willard*, 133 Ind. 562, 33 N. E. 368.

¹¹⁸ Const. art. 4, § 104; *Adams v. Illinois Cent. R. Co.*, 71 Miss. 752, 15

Aside of the public domain, the states, or municipalities under them, own lands for highways, public squares and wharves, or own such an easement therein for these purposes as is in its effect almost or quite equivalent to the fee. It often happens that adjoining land-holders encroach upon these public grounds, in which case they are, in the old phrase, guilty of purpresture. At common law the right of the crown to expel the encroachers, and to remove the obstructions placed by them upon the highway, was not limited by any length of time. But the courts have often looked rather to the municipality than to the state as the owner of the highway, and denied to it the royal prerogative of *nullum tempus*; ¹¹⁹ and in Ohio a possession and private use of a street for 21 years bars the public under the words of the statute; and in Kentucky also the purpresture may become lawful if notice be given to the governing body.¹²⁰ But in Illinois, the soil of the street being held by the town or city in its governmental capacity, the sovereign right attaches, and the purpresture cannot grow into title; and it is so in Missouri, and in several other states, either by plain statute or by construction.¹²¹

South. 640. *Contra, Board of Sup'rs of Madison Co. v. Powell*, 71 Miss. 618, 15 South. 109. So, also, in Tennessee, as to school lands. Code, § 3462. In Missouri, before 1865, subdivisions of the state did not enjoy the privilege (*St. Charles Co. v. Powell*, 22 Mo. 525; *School Directory of St. Charles Tp. v. Goerges*, 50 Mo. 194); but a law of that year, now part of section 6772, exempts from limitation all lands given or appropriated to public, pious, or charitable purposes, as well as those belonging to the state. See *New Hampshire*, Pub. St. c. 137, § 20.

¹¹⁹ *Dudley v. Trustees of Frankfort*, 12 B. Mon. 610; same principle recognized in *Rowan v. Town of Portland*, 8 B. Mon. 259, and *Alves v. Town of Henderson*, 16 B. Mon. 131. In Kentucky, the rights of both parties are regulated by St. 1894, §§ 2546, 2547, by which the ordinary limitation runs in favor of the encroacher, but only after he has given written notice of his possession to the governing body of the city or town, or county court of the county. So, in Iowa. *Davies v. Huebner*, 45 Iowa, 574.

¹²⁰ Ohio, Rev. St. § 4977; Kentucky, St. 1894, §§ 2546, 2547.

¹²¹ *Lee v. Mound Station*, 118 Ill. 304, 8 N. E. 759. The difference between the property which a city owns in its political, and that which it owns in its associate, capacity, is thoroughly discussed by Robertson, J., in *City of Louisville v. Com.*, 1 Duv. 295; only, he throws too much of the property on the associate side. In *City of Chicago v. Middlebrook*, 143 Ill. 265, 32 N. E. 457, a short limitation was enforced against the city for lots not put to any public use. And so, in Connecticut (section 2971) and in North Carolina (section (1376).

Very often, in a new and growing country, whole villages, or great additions to cities and towns, are laid out by the landowner on maps, with streets, alleys, wharves, and public squares; and the lots are sold from time to time with reference to these maps. The highways laid down on these maps are thereby not only dedicated to the public who may wish to pass and repass on them, but the men who buy the abutting land acquire a very substantial interest, for without the use of the open highway their lots would become almost useless. The municipal body represents the former interest rather than the latter. The dedication is, at least as to parts of the ways shown on the map, made long before any necessity arises for opening them to travel. Now, under these conditions the private use of spaces marked as public has in many cases been held as compatible with the dedication. The city or town need not, in a bodily sense, open them till they are needed; and neither limitation will run nor laches be imputable until the streets are actually opened, or until the time when such opening has become necessary and proper.¹²² Where an institution belonging to and wholly governed by the state is made by the law a body corporate, it seems the better opinion that it does not enjoy the prerogative of nullum tempus, and so it has been held in Virginia; but the contrary position has been taken by the supreme court of Iowa.¹²³

150), no title can be gained by "building on and inclosing," or "by any occupation of" the lands of a railroad or canal,—in the latter state, also, of turnpikes and plank roads; all of these, though private property, being considered as quasi highways, and of public interest. *Webb v. City of Demopolis*, 95 Ala. 116, 13 South. 289 (street inalienable, hence no prescription); *Williams v. City of St. Louis*, 120 Mo. 403, 25 S. E. 561.

¹²² *Henshaw v. Hunting*, 1 Gray, 203 (as to South Boston, laid out in 1801 and 1805, not opened till 1851,—the leading case); *Derby v. Alling*, 40 Conn. 410 (cannot expect a paper village to fill at once); *Bartlett v. Bangor*, 67 Me. 460 (20 years after acceptance and public use); *Oswald v. Grenet*, 22 Tex. 94; *Reilly v. City of Racine*, 51 Wis. 526, 8 N. W. 417; *Meier v. Portland Cable Ry. Co.*, 16 Or. 500, 19 Pac. 610; *Shea v. City of Ottumwa*, 67 Iowa, 39, 24 N. W. 582 (delay in grading and paving not an abandonment); *Town of Lake View v. Le Bahn*, 120 Ill. 92, 9 N. E. 269 (this holds good though lots are marked with areas including the street); *City of Little Rock v. Wright*, 58 Ark. 142, 23 S. W. 876. Many of these cases refer to the American Notes upon *Dovaston v. Payne*, in 2 Smith, Lead. Cas. 142.

¹²³ *McClanahan v. Western Lunatic Asylum*, 88 Va. 466, 13 S. E. 977. *Contra, Manatt v. Starr*, 72 Iowa, 677, 34 N. W. 784.

Notwithstanding the common-law maxim that the king can neither part with nor gain title except by matter of record, the state may gain a right of way by prescription; and cities, towns, or other municipal bodies can by adverse possession gain, not merely the rights of way or easements, but the fee simple in land used for parks or public buildings.¹²⁴

Where Indian tribes have been settled in some of the older states, the title to the lands set aside to them is generally made inalienable, and for the same reason also imprescriptible. No grant can be presumed where none can be legally made; but where a statute gives to an Indian tribe a particular remedy by action by which to test its rights to land, the action must be brought within the statutory time.¹²⁵ An exception has been ingrafted by the federal tribunals upon the nullum tempus doctrine. Whenever the United States, not in its own pecuniary interest, but at the request and in the interest of private parties, brings a suit at law or in equity to annul a land patent, or an inchoate right in the public domain, it is barred by time, or chargeable with laches, whenever the party for whose benefit the suit has been begun would be barred by limitation or lapse of time.¹²⁶

§ 180. Limitation of the Tax Lien.

In his daily practice, the lawyer or conveyancer has much oftener to deal with the sovereign as the taxing power than as the owner of the public domain; and in the examination of almost every title, he has to answer himself, what claims for tax on the land are barred by time. We cannot go through all the state laws fixing the length of time which bars the state, or county, or city, town, and school-district taxes on land, or fails to bar them, and which are so often changed, and may even differ between town and town

¹²⁴ Price v. Town of Breckenridge, 92 Mo. 378, 5 S. W. 20; State v. Walters, 69 Mo. 463; Prudden v. Lindsley, 29 N. J. Eq. 615; 3 Kent, Comm. 451,—and see next section as to possession of parks.

¹²⁵ Connecticut, Gen. St. § 27; Seneca Nation of Indians v. Christie, 126 N. Y. 122, 27 N. E. 275.

¹²⁶ Curtner v. U. S., 149 U. S. 662, 13 Sup. Ct. 985, 1041; U. S. v. Beebe, 127 U. S. 338, 8 Sup. Ct. 1083; U. S. v. San Jacinto Tin Co., 125 U. S. 273, 285, 8 Sup. Ct. 850.

in the same state. But a few general principles may be laid down:

First, the lien of a state tax on land cannot be gotten rid of by anything short of payment, unless a statute expressly says so, or unless the remedy for collecting the tax is laid down with such particulars as to time at which each step must be taken that the omission to take these steps on the proper days in the proper year will leave the state remediless.¹²⁷ In other words, the state, as holder of the demand for taxes, is not bound by the general words of the statute barring similar money demands.¹²⁸ But in most of the states a limit is set, back of which arrears cannot be collected.¹²⁹

Second, where a judicial proceeding lies, and the time for it is limited, such time must be counted from the completion of the assessment; for until then the cause of action of the state against the land or its owner has not fully accrued.¹³⁰

Third. Counties and cities do not occupy the high vantage ground that the state does, and the taxes levied by their authority are barred by the same lapse of time as like demands between man and man, i. e. "demands arising by statute other than a penalty or forfeiture"; and with the limitation of the tax the lien for it falls,—gen-

¹²⁷ As a rule, wherever a summary process is given for the collection of taxes, state or town, an ordinary lien suit will not lie. *Johnston v. Louisville*, 11 Bush, 527. The Texas law for the collection of delinquent taxes prescribes a continuous process, which cannot well run over into another year, but directs (in section 16) that no delinquent shall plead or in any manner rely upon any statute of limitations, either against the state or any county, city, or town, or village (see Append. Rev. St. p. 38). New York has passed a number of statutes to enable the collector to proceed after the regular dates. See 2 Rev. St. 1889, p. 1120 et seq.

¹²⁸ *State v. Tittmann*, 119 Mo. 661, 24 S. W. 1032; *Id.*, 103 Mo. 553, 15 S. W. 936; *Id.*, 103 Mo. 569, 15 S. W. 941. Here county and city taxes are included as imprescriptible.

¹²⁹ In New York, a liability created by statute is barred in six years (Code Civ. Proc. § 382, subd. 2). *People v. Supervisors of the County of Columbia*, 10 Wend. 363, holds that, since the Revised Statutes, such limitations bind the state. *State v. Yellow Jacket Silver Min. Co.*, 14 Nev. 220. The state, as to taxes, is bound by the statute.

¹³⁰ *Brown v. Painter*, 44 Iowa, 368; *City of Burlington v. Burlington & M. R. R. Co.*, 41 Iowa, 134 (it is said here, like common debts, though most writers on taxation hold that a tax is never a debt); *McCracken Co. v. Mercantile Trust Co.*, 84 Ky. 344, 1 S. W. 585 (5 years, as "liability arising from statute").

erally in four, five, or six years.¹³¹ The bar runs from the time when the usual process for collecting the tax could have been issued.¹³²

Fourth. Where the tax has not been assessed—or, what is more usual, has not been lawfully assessed—at the time prescribed, so that it cannot be then enforced either by summary or by judicial process, it cannot be assessed thereafter without an express law for that purpose. Such laws have been enacted in most states, either fixing in general words the number of years back for which missing assessments may be supplied, or the legislature from time to time, when it overhauls the revenue system, names a certain year back to which, but no further back, retrospective assessments may be made.¹³³ In either case, the lien on the land for the payment of the tax which was not lawfully assessed in its due season is kept alive, and attaches to the belated assessment.¹³⁴

The Maryland statute, which names four years within which municipal taxes must be proceeded for, is peculiar in this, that it requires the limitation to be pleaded. It has been held that a subsequent promise (even after the bar is completed) will take the demand, along with the lien on the land by which it is secured, out of the statute, and it is doubtful whether anyone but the owner (e. g. a judgment creditor) can profit by it.¹³⁵ In other states the laws limiting

¹³¹ Thus, five years from January 1st after the tax is due, in Pennsylvania. Pennsylvania, Brightly, Purd. Dig. "Municipal Claims," etc., 8.

¹³² City of Louisville v. Johnson, 95 Ky. 254, 24 S. W. 875.

¹³³ Such is article 4777, Rev. St., of Texas, which allowed assessments back to January 1, 1873.

¹³⁴ The supreme court of Alabama quotes approvingly, in Perry Co. v. Selma, M. & M. R. Co., 58 Ala. 546, 561: "Property is often omitted from the roll by the assessors for one or more years, and most of the states have statutes authorizing the assessors, when they ascertain such omissions, to place the property on the roll, with the tax extended, for the past years. The legislative authority for the omitted years is not exhausted by the failure of the party or the assessors to place it on the roll, and such assessments are valid." In Kentucky, however, the statute (1894, § 4021) allows an assessment of omitted property to be made only five years back, and, even within this limit, it is not to overreach conveyances made in the meanwhile.

¹³⁵ Maryland, Pub. Gen. Laws, art. 81, § 83; Baden v. Perkins, 77 Md. 465, 26 Atl. 1008; President & Directors of Georgetown College v. Perkins, 74 Md. 72, 21 Atl. 551; Hebb v. Moore, 66 Md. 167, 7 Atl. 255; Perkins v. Dyer, 71 Md. 421, 18 Atl. 889. But, when the land gets into the hands of

the collection of taxes, or the enforcement of the tax lien after a named period, work with greater certainty. The tax, not being a debt, cannot be aided by the delinquent's promise, and when the time has run the lien is gone. So, in Massachusetts, the superior lien for taxes ceases in two years from the time when they are put into the hands of the collector, though as against the delinquent owner the bill may still be levied like an execution.¹³⁶ In Connecticut the lien expires in one year from the time when the taxes become due,—that is, when they are put in the hands of the collector.¹³⁷ In Missouri no suit can be brought for the recovery of state, county, or municipal tax after five years from the time when it becomes delinquent.¹³⁸ In Kentucky the state is bound by the general law, and a tax, being a liability arising by statute, is barred in five years from the time at which it could have been enforced.¹³⁹ In California, upon like grounds, the limitation is three years for all taxes alike.¹⁴⁰ In Oregon the state has five years to sue for its taxes.¹⁴¹ In Minnesota taxes of all kinds are barred in six years.¹⁴² In Virginia and West Virginia, city, town, and county taxes are put on the same footing with the state revenue, with regard to manner of collec-

the chancellor, the collector can no longer levy, the limitation does not run during the suit, and the tax is paid from proceeds of sale. *Hebb v. Moore*, 66 Md. 167, 7 Atl. 255. Doubt whether the clause bars "assessments for benefits." *Gould v. Mayor & City Council of Baltimore*, 58 Md. 46.

¹³⁶ Massachusetts, Pub. St. c. 12, § 24, enforced in *Rich v. Tuckerman*, 121 Mass. 222; *Russell v. Deshon*, 124 Mass. 342 (tax sale void if there is a conveyance, and proceeding taken thereafter and beyond the two years). Taxes for sewers, drains, or sidewalks are within the limitation. See chapter 50, § 22.

¹³⁷ Connecticut, Gen. St. §§ 3890, 3891.

¹³⁸ Missouri, Rev. St. § 7692.

¹³⁹ Kentucky, St. 1894, § 2523. As to city taxes, this was always conceded. Those for Louisville being distrainable on the 20th of August following the assessment, the limitation for the lien suit against the land runs from that day. *City of Louisville v. Johnson*, 95 Ky. 254, 24 S. W. 875. As to the loss of the lien, which the sheriff who is liable to the state has by subrogation, he may lose it by laches in much less time. *Parringin v. Pickens*, 82 Ky. 449; *Leach v. Kendall*, 13 Bush, 424.

¹⁴⁰ Los Angeles Co. v. Ballerino, 99 Cal. 593, 34 Pac. 329.

¹⁴¹ State v. Baker Co., 24 Or. 141, 33 Pac. 530 (suit for state against county; but that against the delinquent stands on same ground).

¹⁴² Mower Co. v. Crane, 51 Minn. 201, 53 N. W. 629.

tion.¹⁴³ Pennsylvania bars all municipal taxes (those of counties, cities, etc.) in four years from the 1st of January following the time for collection.¹⁴⁴

The reader is, however, warned to distinguish between the lien before sale, which is discussed above, and the rights which the state, city, or town acquires by bidding in the land for want of other bidders. If the proceedings are bad, the lien might not ripen into a title; but if they are good, the state or town will, after the lapse of the time for redemption, and then only, gain the title, and thereafter have the full time of the bar of ejectment wherein to recover it.

§ 181. Possession—Actual, etc.

The possession of the defendant, and of those with whom he connects his own, must be an "actual, continued, visible, notorious, distinct, and hostile possession," though some of these defining words are sometimes qualified.¹⁴⁵

¹⁴³ Virginia, § 2929; West Virginia, c. 47. § 35.

¹⁴⁴ See note 131, supra.

¹⁴⁵ Adverse possession is well treated in the American notes to *Taylor v. Horde*, 2 Smith, Lead. Cas. 1869. That case itself is too complex, and too un-American in its facts, to be instructive. *Nepean v. Doe*, republished with it, as part of the text to Mr. Smith's notes, was decided under the statute of Wm. IV., which dispenses greatly with the aduerseness of possession, and which has not been re-enacted in this country. The definition in our text was given by Mr. J. Duncan in *Hawk v. Senseman*, 6 Serg. & R. 21, and has since been repeated in judicial opinions a hundred times and more; e. g. in *Yelverton v. Steele*, 40 Mich. 538; *Paldi v. Paldi*, 95 Mich. 410, 54 N. W. 903; *Judson v. Duffy*, 96 Mich. 255, 55 N. W. 837 (question not to be left to jury unless there is proof to these qualities); *Murray v. Hoyle*, 97 Ala. 588, 11 South. 797 (possession is not *prima facie* adverse); *Normant v. Eureka Co.*, 98 Ala. 181, 12 South. 454. In *Ward v. Cochran*, 150 U. S. 597, 4 Sup. Ct. 230, a special verdict finding "open, continuous, notorious, and adverse possession" was held insufficient to make out the defense for not saying also "actual and exclusive." The Michigan cases are set out in a note to *Smeberg v. Cunningham*, 96 Mich. 386, 56 N. W. 73. The intention which makes a possession adverse does not make it actual. *Ewing v. Alcorn*, 40 Pa. St. 500. The *pedis possessio* for San Francisco, under the "Van Ness Ordinance," is defined in *Spotts v. Hanley*, 85 Cal. 155, 24 Pac. 738, according to Codes of Civil Procedure of New York (sections 370-372), California, and the Dakotas (sections 46-48). There is adverse possession by any person

The first proposition, before we can determine whether the possession is adverse or not, is: It must be actual, on which a question can hardly arise as to a house and adjoining yard or garden, nor to the tiled and enclosed portions of a farm, but, in this country, very often, when the title to "wild lands" or vacant town lots falls into uncertainty and dispute. To survey such lands or lots; to mark the boundaries; to make a public record of the claim to ownership by listing for taxation; to enter upon them with a view of selling parts, and actually making sales,—is not possession. Rather, these acts or any of them may serve to stamp an actual possession by another, when it exists, as hostile.¹⁴⁶ Paying taxes on land, which is popularly thought to be a clear sign of possession, is nothing of the kind; but such payment has, by recent laws in several states, been made a prerequisite to the plea of limitations.¹⁴⁷

holding under a writing, judgment, or decree, where the land is (1) usually cultivated or improved; (2) protected by a substantial inclosure; (3) used for the supply of fuel, or of fencing timber for the purposes of husbandry, or the ordinary use of the occupant (another clause speaks of the extended or constructive possession). Such is the law in Florida, §§ 1290, 1291; Montana, Code Civ. Proc. c. 2, §§ 34–36; Nevada, §§ 3637–3639; Wisconsin, §§ 4212–4214; South Carolina, Code Proc. §§ 103–105 (where the possessor has no written color of title, the first and second only of the three modes mentioned make a good possession). Georgia, Code, § 2679, says, "continuous, exclusive, uninterrupted, peaceable." Actual possession is shown by inclosure, cultivation, or any use or occupation so notorious, etc., and so exclusive, as to prevent occupation by others.

¹⁴⁶ Beatty v. Mason, 30 Md. 409; Paine v. Hutchins, 49 Vt. 314; Thompson v. Burbans, 61 N. Y. 52 (a leading case); Sorber v. Willing, 10 Watts, 141; Messrs. Hare & Wallace, in their note to Taylor v. Horde, show that some seemingly opposing Pennsylvania decisions were not on disputes over the land, but over the land warrant. Repute or declarations cannot show possession. Walker v. Hughes, 90 Ga. 52, 15 S. E. 912. We shall, under the head of "Short Limitations," find the statutes of Illinois and Colorado which make actual payment of taxes on vacant land equivalent to possession; and see the territorial act for the District of Columbia, Abert's Digest (Act Aug. 23, 1871).

¹⁴⁷ Brown v. Rose, 48 Iowa, 231 (paying tax on wild land and showing it); Scott v. Mills, 49 Ark. 266, 4 S. W. 908 (though accompanied by some acts). Possession of a land certificate is not possession of the land. Harvey v. Cummings, 68 Tex. 599, 5 S. W. 513. The very important exception under the law of Illinois, which, in some cases, requires no possession at all of wild and vacant lands, but only payment of taxes, will be treated in the

There must be "acts of ownership," such as, if exercised by any one but the owner, would be trespasses; such, also, as none but an owner, or one claiming to be the owner, is likely to perform. These words are heard whenever the actuality of possession is discussed.¹⁴⁸ But occasional trespasses—such as cutting timber or turf from forest lands, or from the wooded portions, driving cattle or hogs over unfenced and untilled lands to graze or feed, camping on the land for short times to burn charcoal—have in many parts of the country been justly held not to be acts of ownership; because wild lands, whether part of the public domain or acquired by private owners, are by common consent treated thus with impunity by all comers.¹⁴⁹

section on "Short Limitations." See, hereafter, statutes which make payment of taxes a condition of either the ordinary or of the shorter bar.

¹⁴⁸ *Booth v. Small*, 25 Iowa, 177; *Corning v. Troy Iron & Nail Factory*, 44 N. Y. 577; *Overton v. Davisson*, 1 Grat. 211 (wild lands not subject to acts of ownership); *Morris v. Callanan*, 105 Mass. 129; s. p., cases in note 146, and many cases below. In *Fletcher v. Fuller*, 120 U. S. 534, 552, 7 Sup. Ct. 667, and in some other cases, dealings with the title, without touch of the land, are called acts of ownership. "Use and occupation" is something higher and more effective.

¹⁴⁹ *Wickliffe v. Ensor*, 9 B. Mon. 253, 259 (though a frail shanty had been put up and allowed to rot away); *Jones v. McCauley*, 2 Duv. 14, 16. Nor taking seaweed from a flat. *Trustees of East Hampton v. Kirk*, 68 N. Y. 460; *Moss v. Scott*, 2 Dana, 271; *Denham v. Holeman*, 26 Ga. 182; *Carrol v. Gillion*, 33 Ga. 539; *Fugate v. Pierce*, 49 Mo. 441; *Price v. Brown*, 101 N. Y. 669, 5 N. E. 434 (there can be no adverse possession of vacant, unoccupied, and uninclosed and unimproved land); *Musick v. Barney*, 49 Mo. 458; *Mason v. Stapper* (Tex. Sup.) 8 S. W. 598 (herding sheep); *Wells v. Austin*, 59 Vt. 157, 10 Atl. 405; *Yokum v. Fickey* 37 W. Va. 762, 17 S. E. 318; and *Richards v. Smith*, 67 Tex. 610, 4 S. W. 571 (stacking rails on the land); *Stevens v. Taft*, 11 Gray, 33 (even selling timber off the land not per se possession); *Draper v. Shoot*, 25 Mo. 201 (different in thickly or in sparsely settled country, or in towns); *Williams v. Wallace*, 78 N. C. 354. Texas (Rev. St. art. 3198) requires an "actual and visible appropriation of the land commenced and continued, under claim of right inconsistent with and hostile to the claims of the owner." But Judge Duncan's definition is adopted as its equivalent. *Bracken v. Jones*, 63 Tex. 186. Very strong as to insufficiency of cutting timber are *Cornelius v. Giberson*, 25 N. J. Law, 33; *Parker v. Parker*, 1 Allen, 245; also, *Wells v. Austin*, 59 Vt. 157, 10 Atl. 405. In Maine the statute (chapter 105, § 10) says the land need not be surrounded by fences or rendered inaccessible by water; if the possession comports with the ordinary management of a farm, the part used as woodland need not be inclosed. Clearing

It is different with vacant lots in a city or town,—even large “out-lots” in its sparsely inhabited or uninhabited parts,—where the cutting of grass and timber and the grazing of cows are the customary and only possible acts of ownership; and hiring a city lot to others for grazing purposes is most clearly an act of ownership.¹⁵⁰ And in the country, the possession of swamp lands, which are unfit for tillage or for building or improving in the usual way, can be taken by placing sheep upon them. In short, the quality, the nature, the surroundings of the land, must determine to a great extent to what use they can be profitably put; and such use will be “actual possession.”¹⁵¹ And the cutting of trees from woodland in a well-settled part of the country may be so habitual as to amount to occupation.¹⁵² To inclose lands on all sides, or, if they lie on an unfordable stream, to inclose them on all other sides, by walls, hedges, or fences is the strongest and most enduring act of ownership, as long as the owner in person or by his agents and servants resides within the inclosure, or does work or business within it, either permanently or from time to time,¹⁵³ or as long as he has tenants residing or

the land or regularly selling the timber off it is enough. *Bellingham Bay Land Co. v. Dibble*, 4 Wash. St. 764, 31 Pac. 30; *Alabama State Land Co. v. Kyle*, 99 Ala. 474, 13 South. 43.

¹⁵⁰ *Curtis v. Campbell*, 54 Mich. 340, 20 N. W. 69. In *Sparrow v. Hovey*, 44 Mich. 63, 6 N. W. 93, the acts of ownership were too slight and doubtful. Cutting timber regularly may show a possession. *Beaupland v. McKeen*, 28 Pa. St. 124. No general rule can be given. *Ford v. Wilson*, 35 Miss. 490. *Secus where the trespasses—i. e. cutting timber—went on continuously. Wood v. Missouri, K. & T. Ry. Co.*, 11 Kan. 348; *Williams v. Buchanan*, 1 Ired. 535.

¹⁵¹ *Webber v. Clarke*, 74 Cal. 11, 15 Pac. 431; *Merrill v. Tobin*, 30 Fed. 738; *Murphy v. Doyle*, 37 Minn. 113, 33 N. W. 220; *Babson v. Tainter*, 79 Me. 368, 10 Atl. 63; *People v. Van Rensselaer*, 9 N. Y. 291 (hiring men to watch timber); *De Lancey v. Piepgras*, 138 N. Y. 26, 33 N. E. 822 (marine railroad over flats not possession); *Bowen v. Guild*, 130 Mass. 121.

¹⁵² *Murray v. Hudson*, 65 Mich. 670, 32 N. W. 889. Illinois has a very liberal standard for possession of woodlands. *Scott v. Delany*, 87 Ill. 146.

¹⁵³ *Millar v. Humphreys*, 2 A. K. Marsh. 446. Natural boundary of rocks helps to inclose, *Doolittle v. Tice*, 41 Barb. 181; highway or marked boundaries do not, *Pope v. Hanmer*, 74 N. Y. 240; nor a low, frail barrier, serving only as a mark of boundary, *Yates v. Vande Bogert*, 56 N. Y. 526. Residence not necessary, except under some of the short time acts. *Anderson v. Burnham*, 52 Kan. 454, 34 Pac. 1056.. Inclosure of a larger tract than claimed

working or carrying on business within it.¹⁵⁴ It is, as we have seen, not the only means of possession. There are others, "such as entering upon the land and making improvements, raising a crop, etc., felling and cutting the trees under color of title."¹⁵⁵ The appearance which the dealings with the land bear to others may turn into acts of ownership, and even into "occupation and use," what would otherwise be considered as mere trespasses; and it must often be left to the jury, upon such equivocal acts, whether the defendant and those preceding him in title, were or were not in possession.¹⁵⁶

In what is or has been said of gaining a possession otherwise than by cultivation and improvement, or by substantial inclosure, it must be borne in mind that New York, and other states which

by deed is possession. *Swettenham v. Leary*, 18 Hun, 284. Even under the New York statute, which requires for certain purposes a substantial inclosure, natural ledges of rock on one side and fences on the other are enough. *Becker v. Van Valkenburgh*, 29 Barb. 319; *Hubbard v. Kiddo*, 87 Ill. 578 (use of timber for fuel and fences).

¹⁵⁴ 4 Kent, Comm. 483. "Possession by the termor is possession by the freeholder under whom he holds." *Cunningham v. Brumback*, 23 Ark. 336 (as long as any one of the family remains on the land); *Hughs v. Pickering*, 14 Pa. St. 297; *Hudgins v. Crow*, 32 Ga. 367 (the temporary vacancy while one tenant moves out, and the next moves in, not a discontinuance). Code Civ. Proc. N. Y. § 373 (enforced in *Whiting v. Edmonds*, 94 N. Y. 309), declares the possession of the tenant that of the landlord. There are such declaratory acts in other states. Also, *Warren v. Frederichs*, 76 Tex. 647, 13 S. W. 643.

¹⁵⁵ *Ellicott v. Pearl*, 10 Pet. 412; *Moss v. Scott*, 2 Dana, 271; *Bell v. Denson*, 56 Ala. 444; *Leeper v. Baker*, 68 Mo. 400 (without inclosure or improvement); *Bright v. Stephens*, 1 Houst. (Del.) 31 (especially where lands are not susceptible of inclosure); *Babson v. Tainter*, 79 Me. 368, 10 Atl. 63 (a barren island); *Cass v. Richardson*, 2 Cold. (Tenn.) 28; *Hicks v. Tredericks*, 9 Lea, 491; *Deer Lake Co. v. Michigan Land & Iron Co.*, 89 Mich. 180, 50 N. W. 807; *Moore v. Thompson*, 69 N. C. 120 (quarrying limekiln, etc.); *Goltermann v. Schiermeyer*, 111 Mo. 404, 19 S. W. 484, and 20 S. W. 161 (wood lot adjoining fenced farm); *Marshall v. Beysser*, 75 Cal. 544, 17 Pac. 644 (pasturage); *Beecher v. Galvin*, 71 Mich. 391, 395, 39 N. W. 469 (and Michigan cases there cited); *Maxwell Land-Grant Co. v. Dawson*, 151 U. S. 586, 14 Sup. Ct. 458 (grazing with repute of ownership); *St. Me. c. 105*, § 10. See, also, Georgia decisions in section on "Short Limitations."

¹⁵⁶ *Stevens v. Taft*, 11 Gray, 33; *O'Hara v. Richardson*, 46 Pa. St. 385.
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have copied its statute (as shown in the first note), do not allow that advantage to mere disseisors, but only to those who claim land under written color of title.

An inclosure to keep out either men or cattle, which is the readiest mark of possession, need not be of any particular kind. An instruction that it must be substantial is erroneous.¹⁵⁷ Where the uses of the property or its situation is such that fences on less than on all sides of the property will protect it against inroads by man or beast, such partial inclosure is enough to make out a possession;¹⁵⁸ and this will not come to an end because flaws or breaches in the inclosure are effected.¹⁵⁹ Several neighboring landholders may build a common fence round their lands, which they hold in severalty, and such inclosure will establish the possession of each of them to the lands claimed by him as against strangers; or the disputed land may be inclosed with other lands of the same occupant.¹⁶⁰

Where land is not inclosed, and its use alone constitutes its possession, it must be continuous; but if the use must depend on the season of the year, it need not be continued during the other seasons. For instance, if grazing is done during the spring and summer of each year on land not fitted for other purposes, this is enough.¹⁶¹

¹⁵⁷ Sauers v. Giddings, 90 Mich. 50, 51 N. W. 265; Greene v. Anglemire, 77 Mich. 171, 43 N. W. 772; Beecher v. Galvin, 71 Mich. 395, 39 N. W. 469; Houghton v. Wilhelmy, 157 Mass. 521, 32 N. E. 861.

¹⁵⁸ Arthur v. Ingram (Ky.) 22 S. W. 26; Lantry v. Parker, 37 Neb. 353, 55 N. W. 962. Contra, Morrison v. Chapin, 97 Mass. 72 (inclosure on three sides insufficient).

¹⁵⁹ Moore v. McCown (Tex. Civ. App.) 20 S. W. 1112; Hughes v. Anderson, 79 Ala. 214; Kockemann v. Bickel, 92 Cal. 665, 28 Pac. 686; Gunter v. Meade, 78 Tex. 634, 14 S. W. 562.

¹⁶⁰ Parker v. Newberry, 83 Tex. 428, 18 S. W. 815 (opposite principle in Doolittle v. Tice, 41 Barb. 181); Church v. Waggoner, 78 Tex. 200, 14 S. W. 581; Taliaferro v. Butler, 77 Tex. 878, 14 S. W. 191 (large inclosures for grazing cattle).

¹⁶¹ Lantry v. Parker, *supra*; Webber v. Clarke, *supra*. Same principle, as to a water right, Hesperia Land & Water Co. v. Rogers, 83 Cal. 10, 23 Pac. 196. Wheeler v. Spinola, 54 N. Y. 377, holds an annual entry to cut grass insufficient. See, also, Ricker v. Butler, 45 Minn. 545, 48 N. W. 407; Hull v. Chicago, B. & Q. R. Co., 21 Neb. 371, 32 N. W. 162. But in Webb v. Richardson, 42 Vt. 465, 473, the continuity is treated as a matter of intention; and

The courts seem not to favor the kind of possession, which is sometimes purposely taken of wild lands, that it may ripen into the statute of limitations. An agent is appointed to take care, to warn off trespassers, to make some occasional use of the land by cutting timber, or selling it off in the tree, or grazing. If the agent does actually keep off, or persistently tries to keep, all strangers from trespassing on the land, his principal would clearly have possession; but when it appears that all the neighboring farmers used the timber or grass on the land as the agent did,—in short, if it appears, that his functions were only formal, they will not be recognized as possession.¹⁶² The use of city lots for railroad tracks, or for a town park, though such park be not fenced, is actual possession.¹⁶³

The soil under a partition wall is often of great value, especially in cities, where \$1,000 a front foot is nothing unusual for business lots. In the absence of proof to the contrary, half in width of the soil belongs to the owner on each side. But the possession of each of them "to the wall" is not a possession to its middle, so as to bar the other owner if he have claim to more than half of the soil.¹⁶⁴

Where a mining lease for a long term is given, or a stratum of coal or mineral is sold separately from the ground, and a mine is thereupon opened, under the laws of the United States, and it is held and worked: aside from the ownership in the surface ground, a possession may be reckoned for the mine, which may become adverse to the mine owner, independently of the possession of the land for farming and other like surface purposes; and the same

in *Langdon v. Templeton*, 66 Vt. 173, 28 Atl. 866, this is taken to be a question of fact, and a nonuser for even 13 years is said not to be an interruption as a "matter of law." A schoolhouse during school season sufficient. *Singleton v. School Dist. (Ky.)* 10 S. W. 793.

¹⁶² *Judson v. Duffy*, 96 Mich. 255, 55 N. W. 837; *Scott v. Cain*, 90 Ga. 134, 15 S. E. 816 (where the agent kept trespassers off successfully); *Musser-Sauntry Land, Logging & Manuf'g Co. v. Tozer*, 56 Minn. 443, 57 N. W. 1072; *Stockton v. Geissler*, 43 Kan. 612, 23 Pac. 619.

¹⁶³ Cases in preceding note; also, *East St. Louis & C. R. Co. v. Nugent*, 147 Ill. 254, 35 N. E. 404; *Quindaro Tp. v. Squier*, 2 C. C. A. 142, 51 Fed. 152; *Sheldon v. City of Grand Rapids*, 71 Mich. 508, 39 N. W. 848; *Wood v. Railway Co.*, 11 Kan. 323, 348. See, contra, *Chicago & N. W. Ry. Co. v. Galt*, 133 Ill. 657, 23 N. E. 425, and 24 N. E. 674.

¹⁶⁴ *Huntington v. Whaley*, 29 Conn. 391 ("doctrine of adverse possession is to be taken strictly")

principles will be applied to a mine as to surface land, with regard to continuity of use, and the same distinction between trespasses, acts of ownership, and occupation.¹⁶⁵

While land fit only for summer use need not be occupied in winter, and the condition of a "continued" possession is fulfilled by use during each successive summer, it is otherwise when for more than a year land is abandoned; much more, when land is broken in, one crop made, and nothing more is then done for a number of years. Nay, it has been held in some cases that an abandonment of the land for even a short time, though there be an intention to return, defeats all of the previous possession.¹⁶⁶

We must now consider an interruption by the former owner. An entry by him after the bar is complete is of no avail, for the tolling of the right of entry is the very gist of the statute, and the plaintiff in ejectment, or defendant, cannot count on an unlawful entry.¹⁶⁷

¹⁶⁵ *Armstrong v. Caldwell*, 53 Pa. St. 284 (contra, *Stephenson v. Wilson*, 37 Wis. 482, where mining on the land was deemed an adverse possession of the surface); *Plummer v. Hillside Coal & Iron Co.*, 160 Pa. St. 483, 28 Atl. 853; *Algonquin Coal Co. v. Northern Coal & Iron Co.*, 162 Pa. St. 114, 29 Atl. 402. Shaft sunk and shanty built, but work abandoned, not actual possession. *Ruffin v. Overby*, 105 N. C. 78, 11 S. E. 251. What is necessary for actual possession of mine, see there. What is possession of mine in Nevada, see St. § 3632.

¹⁶⁶ *Holstein v. Adams*, 72 Tex. 485, 10 S. W. 560. Contra, *Crispen v. Hannavan*, 50 Mo. 536 (a break of more than a year may do no harm, when the land is not abandoned); *Pim v. City of St. Louis*, 122 Mo. 654, 27 S. W. 525 (possession of wharf not interrupted by lumber being piled at times on different parts); *Ross v. Goodwin*, 88 Ala. 390, 6 South. 682 (several entries by one no better than entries by several); *Robbins v. Moore*, 129 Ill. 30, 21 N. E. 934; *Western v. Flanagan*, 120 Mo. 61, 25 S. W. 531 (the whole land being submerged for some years, no possession can be counted for that time). As to "abandonment," which is a little more than a pause in cultivation or use, see *Susquehanna & W. V. Railroad & Coal Co. v. Quick*, 68 Pa. St. 189; *Core v. Faupell*, 24 W. Va. 238 (payment of taxes after abandonment no cure). Abandonment even for one day fatal. *Olwine v. Holman*, 23 Pa. St. 279. An interruption, even while the statute is suspended (e. g. during the Civil War), is fatal. *Malloy v. Bruden*, 86 N. C. 251. In *Milliken v. Kennedy*, 87 Ga. 463, 13 S. E. 635, an abandonment for as much as a year was excused, because there was always an *animus revertendi*.

¹⁶⁷ There are statutes which declare an entry unavailing unless it is followed up by a year's peaceable possession. Other states, e. g. Virginia and

And, generally, after the possession has been held for 20 years or other statutory time, it may be abandoned with impunity; and the right gained can only be lost by the adverse possession of another for the same length of time.¹⁶⁸

Where the possession of the defendant or of his predecessor is interrupted by a disseisor,—for instance, by one claiming under a void tax deed, or otherwise by a title hostile to his, and the defendant regains possession from him, he cannot count the disseisor's time along with his own, as if he had been his tenant; but it is otherwise where the interruption amounted only to trespasses, or was stealthy and without claim of title.¹⁶⁹

But, if an actual entry is made before the completion of the bar, if the plaintiff takes full possession, and yields it up again only to force or to new untoward circumstances, there is no reason why he should not count a new bar from the new disseisin, even in states in which an entry must continue for a year, and though he have been expelled or been intruded on after a shorter possession.¹⁷⁰ A temporary abandonment of the land by the claimant (which happens often where the buyer at a void sale for taxes goes into pos-

Kentucky, declare that a "continual claim in or near the land," i. e. an entry or attempt to enter once a year, is unavailable. Under a statute of the former kind an entry not followed up by a year's possession would be deemed formal, and would not be a basis for starting from the seisin gained by it the bar of the statute. But quære, would an entry and possession for a shorter time by the owner, any more than by a stranger, break in upon the "continued" possession of the defendant? In *Fletcher v. Fuller*, 120 U. S. 534, 552, 7 Sup. Ct. 667, it is conceded that an entry after more than 20 years is too late.

¹⁶⁸ *Hoffman v. White*, 90 Ala. 354, 7 South. 816; *Sherman v. Kane*, 86 N. Y. 57 (the 20 years need not be the last 20); *Dean v. Goddard*, 55 Minn. 290, 56 N. W. 1060; *Mims v. Rafel*, 73 Tex. 300, 11 S. W. 277. But in Tennessee it seems from the peculiar wording of Code, §§ 3459–3461, that the possession a trespasser held for seven years, and then abandoned, would not avail him. See hereafter, under "Tacking."

¹⁶⁹ *Maxwell v. Higgins*, 38 Neb. 671, 57 N. W. 388. Contra, *Baillard v. Hansen*, 33 Neb. 861, 51 N. W. 295; *Duren v. Sinclair*, 22 S. C. 361. In the first-named case the defendant could have pleaded nontenure, if he had been sued while himself disseised.

¹⁷⁰ The decisions on these statutes are very scant, and so are cases of mere formal entry. Such an entry by the plaintiff took place in *Fletcher v. Fuller*; but the court does not, for reason above given, pass on its effect.

session only to gain the title), when followed by an entry of the true owner, even for a short time, has been held fatal to the possessor, even though he returns afterwards; and this not so much on the primary ground of counting from the owner's last seisin, but because it is the rule that adverse possession must be "continued," or uninterrupted.¹⁷¹ But the true owner's entry should, in order to work an interruption, have all the qualities required in that of his adversary: distinct, notorious, etc., and continuous enough to rise above a visit, or a trespass.¹⁷²

When the former owner is given possession by writ of haberi facias, wrongfully awarded, under a judgment which is afterwards set aside, this is an interruption, when the bar of limitation comes to be tried in a new suit.¹⁷³

Besides being actual and continued, the possession must also be open or visible and notorious. The idea of the old English statute of excusing those "beyond the seas" from diligence in making their entry seems to have been extended by the courts, by excusing the owner's delay when he has no opportunity to know that the intruder is in possession. Hence, no other proof of notoriety is called for, when actual knowledge or personal notice is brought home to the former owner.¹⁷⁴

When the land is occupied and put to use, this is notice in itself, which is not so when the possession rests only on "acts of ownership." When the land is occupied by tenants, and they attorn to one who has color of title, such attornment gives to the new landlord an actual, but not a visible, possession until knowledge thereof

¹⁷¹ Yelverton v. Hilliard, 38 Mich. 355; Brickett v. Spofford, 14 Gray, 514 (owner visiting land to see if any one is in possession, not a good entry); Burrows v. Gallup, 32 Conn. 493 (stealthy entry); Campbell v. Wallace, 12 N. H. 362. Contra, Stevens v. Taft, 11 Gray, 33.

¹⁷² Creech v. Jones, 5 Sneed, 631; Hollinshead v. Nauman, 45 Pa. St. 140; Bowen v. Guild, 130 Mass. 121; Pope v. Henry, 24 Vt. 560; Thompson v. Pioche, 44 Cal. 508 (attornment of tenants to owner breaks continuity).

¹⁷³ Gould v. Carr, 33 Fla. 523, 15 South. 259.

¹⁷⁴ Brown v. Cockerell, 33 Ala. 38; Key v. Jennings, 66 Mo. 367; Dausch v. Crane, 109 Mo. 323, 19 S. W. 61. See hereafter Trotter v. Neal, 50 Ark. 340, 7 S. W. 384, and other cases, of claim under invalid gift. No notice or notoriety is needed, as the owner knows his own act.

is brought home to the owner, which might be done if the tenant would refuse to pay him rent, giving the reason.¹⁷⁵

"Visible" and "notorious" are almost, perhaps quite, interchangeable; but "exclusive" is another requisite. The possession, to ripen into a title, must not only exclude the true owner, but the public also. Cases have occurred, though not very often, where two persons, under opposite titles, had one as much possession as the other; each perhaps residing on the same farm, but neither, or both alike, enjoying its fruits. In such a case the possession is made by the law to follow the legal title.¹⁷⁶ Again, the would-be disseisor may have performed many acts of ownership; but he has allowed a number of strangers to commit like acts,—e. g. to cut timber as often as he did,—and by thus allowing the land in question to become a common he has divested himself of possession.¹⁷⁷ And where the occupant is a part owner with others, as we shall show hereafter, the exclusiveness of his possession, as against them, must be visible and notorious.

"Exclusiveness" is generally shown by a fence or inclosure round the land, which, except in the states that have legislated on the subject, need not be "lawful" or "substantial," but must indicate the purpose to exclude interlopers; and it has been held, in a well-considered opinion, that "when the possession is by actual occupation of the possessor, or by his tenants, under claim of title, his possession is visible, open, notorious, distinct,"—that is, no other facts are needed to establish these further qualities.¹⁷⁸

¹⁷⁵ Musick v. Barney, 49 Mo. 458 (distinguishing Ewing v. Burnet, 11 Pet. 53); Huntington v. Allen, 44 Miss. 663; Dixon v. Cook, 47 Miss. 220; King v. Carmichael, 136 Ind. 20, 35 N. E. 509 (infant not entitled to notice). In Florida S. R. Co. v. Loring, 2 C. C. A. 546, 51 Fed. 932, the court says that under the Florida statute, which allows one claiming without color of title to have an adverse possession by cultivation or inclosure, no further requisite, such as knowledge by the owner, can be interpolated. Infants not entitled to special notice. King v. Carmichael, 136 Ind. 20, 35 N. E. 509.

¹⁷⁶ Doe v. Clayton, 81 Ala. 391, 2 South. 24.

¹⁷⁷ McConnell v. Wilborn (Ky.) 24 S. W. 627. Contra, Winnipisiogee Paper Co. v. New Hampshire Land Co., 59 Fed. 542 (prosecution of trespassers is

¹⁷⁸ Greene v. Anglemire, 77 Mich. 168, 43 N. W. 772. See, contra, New York cases in note 153.

It is hard to say what is meant by "distinctness," as one of the requisites of an adverse possession. It certainly does not mean that the boundaries must be shown on the ground, either by an inclosure or by marks and monuments. Whatever difficulty a jury may have in determining how much land was adversely possessed for the requisite time must be borne with.¹⁷⁹

A word must be said here on the doctrine of "presuming a grant." This has been very widely applied in the law of easements, with which we are not here concerned, though not as widely as in England, where the law of ancient lights is grounded upon it. But this doctrine has also been appealed to where the defendant and those under whom he claims have been in possession, but in a somewhat loose possession, for a great number of years, much longer than the ordinary bar, but which is open to doubt on some of the elements,—actual, uninterrupted, notorious, exclusive. In such cases the court will tell the jury that they may presume a grant, if it was legally possible,—that is, if the parties who must have made such a grant to the defendant's side were capable in law of making it,—and the jury should not be told, further, that, if the evidence in favor of the presumption is overcome by the evidence against it, they must not presume it, nor that they must find the existence of such grant or lost deed as a fact "on their consciences"; for such presumption is, in plain English, rather a fiction.¹⁸⁰

an element of adverse possession). Same principle, *Bracken v. Union Pac. Ry. Co.*, 5 C. C. A. 548, 56 Fed. 447; *Boulo v. New Orleans, M. & T. R. Co.*, 55 Ala. 480.

¹⁷⁹ *Cooper v. Morris*, 48 N. J. Law, 607, 7 Atl. 427; *Foulke v. Bond*, 41 N. J. Law, 527.

¹⁸⁰ *Fletcher v. Fuller*, 120 U. S. 534, 545, 7 Sup. Ct. 667 (the writer honestly believes that there was enough evidence of continued possession for the defendants to need no help from presumptions). The court quotes (aside from easement cases) *Casey's Lessee v. Inloes*, 1 Gill (Md.) 430, 503; *Williams v. Donell*, 2 Head (Tenn.) 695; *Eldridge v. Knott*, Cowp. 215 (Lord Mansfield); *Hillary v. Waller*, 12 Ves. 239, 252; also, *Ricard v. Williams*, 7 Wheat. 59, quoting Lord Kenyon's remark that not only one but a hundred grants may be presumed.

§ 182. Possession—Hostile.

A weak spot in the law of realty is the difficulty in determining when a possession is hostile. We shall hereafter speak of those relations between the occupant and owner which make the possession of the former amicable; such as landlord and tenant, tenant in common and fellow tenant, trustee and cestui que trust, to which may be added, husband and wife. But even between men who are in law strangers to each other the same question often arises, has the possession been hostile? And when it does arise, the title to land is made to depend not only on evidence of matter not of record, and not in writing, which is bad enough, but on questions of intention, hope, or belief.¹⁸¹ A possession, in order to become a bar to the owner's right of entry or action, must be adverse during the

¹⁸¹ It seems that the possessor's mind and intent were inquired into in all systems of law. In the Roman law the possession cannot ripen into title if it is held "clam, vi aut precarie"; the last word "beggingly" meaning if it be held at the owner's will or at sufferance; and is often rendered in English "permissive." Or, as Heineccius puts it (quoting Dig. L. 25, ff, "De usucapione"), there must not only be natural, but also civil, possession; that is, one cum animo dominii, vel sibi habendi. The Code Civil of France (article 2229) requires that, among other things, the possession be "non équivoque, et à titre de propriétaire" (that is, under claim of ownership), and by article 2236 denies the prescriptive title to the fermier, etc., et tous autres qui détiennent precairement (at sufferance). The Mishna also (Baba Batra, c. 3, § 3) says: "Joint owners, cultivators on shares, and guardians have no Hazaka (presumption of grant). Neither has the husband in the wife's estate, nor she in his; the father in the son's estate, nor the son in the father's." Here, at least, the exception to the rule is as well defined as the rule. The statute 3 & 4 Wm. IV. c. 27, seeks to attain the same simplicity (20 years are to be counted from the time the right first accrues to the plaintiff, or those under whom he claims), and declares afterwards that the right accrues "at the time of [his] dispossession or discontinuance of possession, or at the last time at which profits or rent were or was received." In short, the act deals only with the plaintiff's lack of possession, not with the manner of defendant's possession. It is not for us here to discuss how vacant land can be dealt with under such a law. The exchequer chamber, in Nepean v. Doe, 2 Mees. & W. 910, 2 Smith, Lead. Cas. 466, says that the act seems to have done away with the doctrine of nonadverse possession.

whole length of the statutory time, just as it must be actual and visible during the whole of that time.¹⁸²

Now, there are many cases in which the occupant stands in none of the above-named relations to the owner, and where, nevertheless, an actual, open, uninterrupted possession for a sufficient number of years has been held unavailing, because not adverse. The defendant has bought one of several lots belonging to his grantor, but has fenced in another lot adjoining it, and kept it under cultivation for 20 years; but it was done with the owner's permission; no rent is charged or paid; the assessor's list follows the recorded deeds; the occupant is not a tenant, but his holding is called a quasi tenancy; and the owner recovers.¹⁸³ Or a woman moves into an empty house, without the owner's leave, never pays any rent, never promises to pay him, nor recognizes him as her landlord in any way, rents out rooms, takes in boarders for 15 years,—the statutory length of time. But she always expected, the court says, to pay rent or to leave, whenever the landlord should demand it. She is in neither under color of title nor as a defiant trespasser, and thus time does not aid her.¹⁸⁴ And a squatter who occupies a part of the public domain in the hope and expectation of taking out his patent does not hold adversely, while he expresses such hope or intent.¹⁸⁵

Where a possession begins lawfully, the old doctrine is that it cannot become adverse without some clear expression of intent to keep the land away from the true owner. Thus where a devisee is to hold for a number of years, although he does not thereby become a tenant to those in remainder, yet his mere holding over is not deemed hostile until there has been a demand and refusal of possession, or

¹⁸² *Bracken v. Jones*, 63 Tex. 184; *Satterwhite v. Rosser*, 61 Tex. 166; *Wickliffe v. Ensor*, 9 B. Mon. 253; *Musick v. Barney*, 49 Mo. 458 (must be such possession as owner would have observed if he had visited the land); *Fauntleroy v. Henderson*, 12 B. Mon. 447.

¹⁸³ *Draper v. Monroe* (R. I.) 28 Atl. 340 (resting on the distinction in 4 Kent, Comm. 482, between dispossession and disseisin); *Ricard v. Williams*, 9 Wheat. 59; *Doe v. Thompson*, 5 Cow. 371; *Evans v. Berlocher*, 83 Tex. 612, 19 S. W. 158. As to the necessity of some claim of right, see *Ewing v. Burnet*, 11 Pet. 41; *McCracken v. San Francisco*, 16 Cal. 635.

¹⁸⁴ *Smeberg v. Cunningham*, 96 Mich. 386, 56 N. W. 73.

¹⁸⁵ *Schleicher v. Gatlin*, 85 Tex. 270, 20 S. W. 120.

until he conveys, or brings his hostile intention home to the owners; and this doctrine has been carried very far.¹⁸⁶

Generally speaking, the older authorities, starting from the doctrine of disseisin under the common law, will never presume the possession of any person to have been adverse to the owner when it can be explained on other grounds; or when the possessor has even a naked legal title, under which he might hold the land amicably.¹⁸⁷ The modern tendency is the other way. Thus the doctrine is held in Texas that whenever there is an actual possession it is presumed to be adverse, unless the contrary be shown.¹⁸⁸ It has also been held that a "speculative trespasser"—that is, one who takes possession of land purposely, to become the owner by the length of his adverse holding—is entitled to the statutory bar.¹⁸⁹ The element of good faith is thus wholly eliminated while (aside of the short limitation laws of Illinois, North Carolina, Georgia, and Colorado) in North Carolina and Georgia, as formerly in New York, the statute insists that the possession must not be obtained by fraud; that is, it does not allow a trespasser upon land to acquire color of title on purpose from a stranger, for the sole purpose of gaining color of title, and through it a clearly adverse holding.¹⁹⁰ For, just as a feoff-

¹⁸⁶ Zeller's Lessee v. Eckert, 4 How. 289 (from Pennsylvania, and based on Pennsylvania precedents)—a strong case, for it was the husband of a devisee for years who remained in possession after her removal, without shadow of right. It is said by the court that, under the old authorities, a party thus entering would not have been allowed to make his possession adverse by any declaration, but must first surrender it; but such is not now, nor was it even then, any longer the law. Bannon v. Brandon, 34 Pa. St. 263. It is doubtful, whether courts in other states would go even so far. See, however, Proprietors v. Springer, 4 Mass. 416; Thompson v. Pioche, 44 Cal. 508.

¹⁸⁷ Nichols v. Reynolds, 1 R. I. 30, quoting 2 Starkie, Ev. (5th Ed.) p. 257.

¹⁸⁸ Mhoon v. Cain, 77 Tex. 317, 14 S. W. 24. Yet the court here recognizes the proposition in Satterwhite v. Rosser, 61 Tex. 170, "that it must be of such a character as to indicate unmistakably a claim of exclusive ownership." And, if the possession is adverse to the claimant, it matters not that it is amicable as to some one else. Skipwith v. Martin, 50 Ark. 141, 6 S. W. 514.

¹⁸⁹ Craig v. Cartwright, 65 Tex. 424.

¹⁹⁰ The deed which gives the color of title and shows claim of right need not be produced, Jackson v. Wheat, 18 Johns. 40.

ment with livery of seisin at common law gave to the feoffee a seisin by wrong, with all its advantages, so a deed or other writing, purporting to confer upon a person named therein an estate in fee in land therein described, is the readiest and surest means of pointing him out as claiming the ownership, and stamping such possession as he may have as adverse.¹⁹¹ But color of title is not indispensable.¹⁹² One who receives a conveyance of land, or to whom a tract is devised, often takes possession by mistake of more land, or of other land than is described, and as to this he has no color of title; and there is no written evidence of his claiming ownership in such surplus or mistakenly chosen tract. It was long maintained that his holding was not adverse, as he cannot be presumed to do wrong intentionally, but that he would readily restore the land upon finding out his mistake.¹⁹³ But the better opinion is now that when a person occupies, improves, or incloses land by mistake he acts just as hostilely or adversely to the true owner as if he did so knowingly and defiantly. Indeed, if possession through mistake were held not to be adverse, very little room would be left for the statute of limitation, for almost every man who buys land under a bad title labors under the mistaken idea that his deed is good and effectual.¹⁹⁴ In Georgia, however, it has been held deliberately that "a possession

¹⁹¹ Oglesby v. Hollister, 76 Cal. 136, 18 Pac. 146 (tax deed void on its face); Whittlesey v. Hoppenyan, 72 Wis. 140, 39 N. W. 355 (same); Ricker v. Butler, 45 Minn. 545, 48 N. W. 407 (either color of title or claim of right); Davenport v. Sebring, 52 Iowa, 364, 3 N. W. 403.

¹⁹² Evans v. Foster, 79 Tex. 48, 15 S. W. 170 (a trespasser can prescribe, but cannot gain a constructive possession).

¹⁹³ Paine's Lessee v. Skinner, 8 Ohio, 167; Yetzer v. Thoman, 17 Ohio St. 130, and all the cases following of mistaken boundaries; Roots v. Beck, 109 Ind. 472, 9 N. E. 698; Collett v. Board, 119 Ind. 27, 21 N. E. 329 (hence the 20 years' limitation runs as to land misdescribed or not described in the deed). What shows claim of right, see Robinson v. Lake, 14 Iowa. 421; Adkins v. Tomlinson, 121 Mo. 487, 26 S. W. 573 (the question comes up indirectly).

¹⁹⁴ Rowland v. Williams, 23 Or. 515, 32 Pac. 402; Caulfield v. Clark, 17 Or. 473, 21 Pac. 443. The court remarks properly in these cases that the occupant's rights depend not on what he says, but what he does; not on his mental condition, but on his entry. As his mistake would not have been a defense to an ejectment, the statute began to run when by mistake he entered. Yetzer v. Thoman, supra; Mather v. Walsh, 107 Mo. 121, 17 S. W. 755. The leading case is Melvin v. Proprietors, 5 Metc. (Mass.) 15, 32. In

taken through ignorance or mistake cannot become adverse," and in the same state the entry which is to ripen into a prescriptive title must, under the words of the statute, not be fraudulent.¹⁹⁵ It would seem that when neighbors set up a division fence each of them holds the land on his side, though too much is given him by mistake, under claim of right. But this has not always been conceded. A fine distinction has been, or still is, made. If the party who has too much land on his side has claimed only "to the true line, wherever it may be," treating the fence as only provisional, his holding is not adverse, but, if he claims to the fence, it is. The courts have lately been inclined to find the facts according to the latter view.¹⁹⁶ At all events, the wrongful occupant's intent and acts alone must be considered; the protests of the dispossessed cannot make the other's possession "amicable" or "subordinate."¹⁹⁷

Where the owner and possessor of land loses his title by a judicial sale, which he recognizes as just and lawful, the courts have gone very far in looking upon his subsequent possession as "permissive," or subordinate to the purchaser's title; and this view is very much strengthened if the former owner, or his wife or family continuing in possession after him, do not list the land for taxation, but allow

Nebraska, land taken by mistake is held adversely. *Tex v. Pflug*, 24 Neb. 666, 39 N. W. 839; *Levy v. Yerga*, 25 Neb. 764, 41 N. W. 773.

¹⁹⁵ *Doe dem. Keel v. Roe*, 20 Ga. 190; *Brown v. Wells*, 44 Ga. 573 (bad faith purchase). However, in the absence of proof, an entry in good faith is presumed. *Evans v. Baird*, Id. 645.

¹⁹⁶ *Goltermann v. Schiermeyer*, 111 Mo. 404, 19 S. W. 484, and 20 S. W. 161; reviewing *Cole v. Parker*, 70 Mo. 377; *Schad v. Sharp*, 95 Mo. 574, 8 S. W. 549; *Handlan v. McManus*, 100 Mo. 125, 18 S. W. 207; *Battner v. Baker*, 108 Mo. 311, 18 S. W. 911. Contra, also, *Wilson v. Lerche*, 90 Mo. 473, 2 S. W. 312. The Michigan view is still more favorable to the possession. *Bird v. Stark*, 66 Mich. 654, 33 N. W. 754. This is thus well stated in *Greene v. Anglemire*, 77 Mich. 168, 43 N. W. 772, in an instruction to the jury, which is approved by the supreme court: "If you find such continued adverse possession," etc., "then," etc., "it is wholly immaterial how or by what right or authority the fence came to be constructed and maintained along the line where it stood on," etc., "if it was by error or mistake." So, also, *Ramsey v. Glenny*, 45 Minn. 401, 48 N. W. 322 (light buildings on city lots). The unfortunate distinction is also recognized in Iowa, *Grube v. Wells*, 34 Iowa, 148; and in Florida, at least by a dictum, in *Watrous v. Morrison*, 33 Fla. 274, 14 South. 805.

¹⁹⁷ *Whitman v. Stelger*, 46 Cal. 256.

the purchaser to pay the taxes.¹⁹⁸ On the other hand, a grantor has in many cases been allowed to gain a possessory title against his grantee by keeping possession after the sale or gift. Many reasons may exist for not turning the land over. The consideration may not have been paid; the contract may have been rescinded. And in these cases the warranty in the deed will not estop the grantor, for his prescriptive rights are as effective as if he had taken a deed back from the grantee.¹⁹⁹ A vendee of land by title bond, or executory contract, who has not paid the whole of his purchase money, and is not, under his contract, entitled to a deed, is considered as a quasi tenant of his vendor, and holding possession for him. But when he has paid the full price, or so much thereof as entitles him to a deed, his possession is taken to be hostile to his vendor and to all the world.²⁰⁰ A vendee by deed in fee simple is always supposed to hold adversely both to his grantor and to all the world. If in New York, and in Georgia, good faith is required for building up an adverse possession, we may at all events assert that a grantee in good faith everywhere holds adversely to all the world.²⁰¹

Where a mother is in possession of the land of her minor child, though she has not qualified as guardian, or where a widower lives on a farm with step children, the heirs of his wife, the former owner,

¹⁹⁸ Neilson v. Grignon, 85 Wis. 550, 55 N. W. 890 (late owner and widow holding for 37 years). Same principle, Graydon v. Hurd, 5 C. C. A. 258, 55 Fed. 724; Whitlock v. Johnson, 87 Va. 323, 12 S. E. 614.

¹⁹⁹ Traip v. Traip, 57 Me. 268; Sherman v. Kane, 86 N. Y. 57; Garabaldi v. Shattuck, 70 Cal. 511, 11 Pac. 778; Smith v. Montes, 11 Tex. 24; Tilton v. Emery, 17 N. H. 536; Stearns v. Hendersass, 9 Cush. 497 (remote grantee). House v. McCormick, 57 N. Y. 310, 320, is distinguished. Contra, Livermore v. City of Maquoketa, 35 Iowa, 358. But not adverse as long as the grantee's right is acknowledged. Nichols v. Nichols, 79 Tex. 332, 15 S. W. 272.

²⁰⁰ Tayloe v. Dugger, 66 Ala. 444. In Stamper v. Griffin, 20 Ga. 312, it was said that a vendee under a title bond, though forged, holds a "subordinate" possession, but he holds adversely, where his obligor personated the owner. Keys v. Mason, 44 Tex. 144; Clark v. Adams, 80 Tex. 674, 16 S. W. 552.

²⁰¹ King v. Carmichael, 136 Ind. 20, 35 N. E. 509; Blight's Lessee v. Rochester, 7 Wheat. 535; Society for Propagation of the Gospel v. Town of Pawlet, 4 Pet. 480; Croxall v. Shererd, 5 Wall. 268; Watkins v. Holman's Lessee, 16 Pet. 54.

and in all similar circumstances, the possession of such parent is, in the absence of distinct acts of ownership and exclusive claim, deemed amicable, and the limitation will seldom run until such parent is dead, or makes a grant in fee.²⁰²

Where a father turns over a house or farm to one of his children without conveyance, still remaining the owner, the child is supposed to hold it as a tenant at will,—“*precarie*,” as the civilians would say; and, unless the child should do some act which clearly, and to the knowledge of the father, or, after his death, to the knowledge of the coheirs, changes the nature of the holding, he could not gain a title by time. But, when the child openly claims that the land is a gift to him, though not pretending to have a valid conveyance, the possession will be adverse.²⁰³ But where the benefactor, after making the gift by mere word of mouth and delivery of possession, goes on to pay taxes, repairs, and insurance, and to perform all the duties of a proprietor, the possession of the donee is not adverse while he acts in this wise.²⁰⁴

It would seem natural that, if the person in possession holds adversely to the owner, this should be enough to bar him, though he hold in subordination to another; for, at most, the possession might

²⁰² Spencer v. O'Neill, 100 Mo. 49, 12 S. W. 1054; Sansom v. Harrell, 55 Ark. 572, 18 S. W. 1047. E converso, where children, being the true owners, live with their father on the land, his possession does not thereby become less hostile. Douglas v. Irvine, 126 Pa. St. 643, 17 Atl. 802, quoting Lynch v. Cox, 23 Pa. St. 265.

²⁰³ Potts v. Coleman, 67 Ala. 221, and Burrus v. Meadors, 90 Ala. 140, 7 South. 469 (not adverse); Lee v. Thompson, 99 Ala. 95, 11 South. 672 (adverse); Com. v. Gibson, 85 Ky. 666, 4 S. W. 453 (where a parol gift from the father to a son, who by parol exchanged with his sister, was held to give rise to an adverse holding; quoting Lord Mansfield's great saying in Taylor v. Horde, 1 Burrows, 60, that the question of disseisin is one of fact for the jury); Kennedy v. Wible (Pa. Sup.) 11 Atl. 98 (entry under gift, or on pretense of gift, is adverse); Davis v. Davis, 68 Miss. 478, 10 South. 70. Same principle, Craig v. Craig (Pa. Sup.) 11 Atl. 60; Trotter v. Neal, 50 Ark. 340, 7 S. W. 384. We have seen that the donee's possession is at all events “notorious,” as the donor knows of it. The older cases are Sumner v. Stevens, 6 Metc. (Mass.) 337, and Clark v. Gilbert, 39 Conn. 94.

²⁰⁴ Duff v. Leary, 146 Mass. 533, 16 N. E. 417; Thomson v. Thomson, 93 Ky. 435, 20 S. W. 373. See the American (Hare & Wallace's) notes to Nepean v. Doe, and Taylor v. Horde. Swift v. Mulkey, 14 Or. 64, 12 Pac. 76.

be accredited to the latter; and it has been so adjudged. But the contrary view has lately been taken by the supreme court of Texas.²⁰⁵ The holding must not only be hostile in its inception, or towards its end, but during the whole length of the statutory bar. An acknowledgment of the true owner's title, at any time before the bar is complete, makes the possession of the occupant that of the true owner; and it remains such till a new hostile act is committed, such as a conveyance to a third party.²⁰⁶ But, when the bar is complete, the possessor himself becomes owner, and he cannot divest himself of the fee by a verbal acknowledgment, any more than by a verbal grant.²⁰⁷ And, while the acknowledgment of a paramount title, in return for a conveyance of part of the land possessed, breaks the hostile holding of the rest, the mere bargaining with the owner, without direct outcome and without unconditional acknowledgment, has no such result.²⁰⁸

It seems that the courts of the several states have not been governed, in determining when a possession is hostile and when it is not, to any great degree, if at all, by the shape and wording of the local statute. The New York Code, and those of several other states, use language not very different from the English act of 3 & 4 Wm. IV., which, in effect, puts aside the notion of a nonadverse possession; that is, the former owner can neither sue nor defend upon his title, unless he, his ancestor, predecessor, or grantor, was seised or possessed of the premises within 20 years. But, as these words are construed, the owner is deemed to be seised or possessed whenever no other person unites in himself all the elements of an

²⁰⁵ Adams v. Guerard, 29 Ga. 651; Robinson v. Bazoon, 79 Tex. 524, 15 S. W. 585.

²⁰⁶ Lovell v. Frost, 44 Cal. 471; Dietrick v. Noel, 42 Ohio St. 18.

²⁰⁷ Riggs v. Riley, 113 Ind. 208, 15 N. E. 253. And see hereafter, under head of "Short Limitations." Nor by paying rent. Riggs v. Riley, *supra*. In Trufant v. White, 99 Ala. 526, 13 South. 83, it seems that letters written after more than 15 years' possession were allowed as an acknowledgment of superior title.

²⁰⁸ Eldridge v. Parish, 6 Tex. Civ. App. 35, 25 S. W. 49. Desire shown to buy plaintiff out, not material, Rowland v. Williams, 23 Or. 515, 32 Pac. 402; nor buying an adverse title, Singer Manuf'g Co. v. Tillman (Ariz.) 21 Pac. 818. An acknowledgment after time has run immaterial. American Salt Co. v. Heidenheimer, 80 Tex. 344, 15 S. W. 1038.

adverse possession; and the moment when such other person's possession is broken in upon or abandoned, that of the owner recommences. In fact, this construction was formerly placed upon the count in the writ of right, though that not only alleged a seisin within a limited time, but a seisin "by taking the esplees."

Lord Mansfield remarked, in his judgment in the great case of *Taylor v. Horde*, that the difficulty in determining adverse possession only arose after the abolition of feudal tenures. Until then, he was in adverse possession who supplanted the true owner in his relations to the lord.²⁰⁹ But the modern institution of the state tax, for which each owner of land is assessed, and which he may be compelled to pay by distress of his goods (in some places even by bodily restraint), has established as open and visible a relation between the pretended owner and the land as the tenures did anciently. Even in those states in which the tax can be collected only by proceedings in rem, this relation between the land and the claimant of ownership can be traced by the actual payment of the tax. In the older states, especially in Virginia and North Carolina, and their Western offshoots, grants were made without regard to fixed lines, and the same ground might be listed to two or more owners;²¹⁰ but throughout the West, wherever the national surveys by townships and sections prevail, and wherever land is reclaimed and inclosed or cultivated, the listing with the assessor, or the payment of the tax, shows, clearer than anything else, who claims, and who does not claim, ownership, except as to disputed strips on the border of neighboring tracts.²¹¹

Listing for taxation, where land must by law be listed to the owner, would answer the purpose of showing a hostile claim fully;

²⁰⁹ *Taylor v. Horde*, 1 Burrows, 60, 2 Smith Lead. Cas. Eq. 324. He says, among other things: "The freehold never could be in abeyance, because the lord must never be at a loss to know upon whom to call as his tenant." Say, "state" for "lord," and "taxpayer" for "tenant."

²¹⁰ Kentucky made desperate attempts to get rid of outstanding Virginia grants, by laws forfeiting the lands of any owner who should not have them listed in his name; but these laws were always held to be null and void whenever they came before the court of appeals. See *Marshall v. McDaniel*, 12 Bush, 378.

²¹¹ In *Neilson v. Grignon*, supra (note 198), great stress is laid on the taxes being always paid by one party, and never by the other.

and the failure to list would indicate the lack of an intent to claim ownership. But the statutes of several states have (it seems, from fiscal reasons) made the actual payment of taxes one of the conditions of gaining title by an adverse possession. Thus, in California and Idaho, where the ordinary bar is five, in Colorado, where the usual bar is seven years, the possessor must have paid all taxes, state, county and municipal, during the time when he held adverse possession; and it seems that, when this term of five years is lengthened out by disabilities, the party pleading limitation would have to pay the taxes for such longer term.²¹²

§ 183. Amicable Possession.

A trustee cannot hold adversely to the cestui que trust, nor the tenant to his landlord, nor a quasi tenant or licensee to him by whose permission he is in possession, nor one of several joint tenants, coparceners, or tenants in common against his companions in title.²¹³

Let us first consider the case last mentioned, that of several owners in undivided shares,—calling them, for short, joint owners, and supposing that one or more of these (less than all) are in bodily possession of the land, or in receipt of the rents from the occupier. The tenant in common thus in possession is, in consideration of law, holding the land for himself, and his companions. Their ordinary remedy against him, at common law, was not a real action or action of ejectment, but an action of account or suit in equity for the share of the rents or profits belonging to the other joint owners.²¹⁴ As long as the joint owners not in possession nor in

²¹² California, Code Civ. Proc. §§ 323–325; Idaho, §§ 4041–4043 (must pay all taxes “assessed according to law”). The possessor of part of a tract which is assessed as a whole must pay the taxes on it. *McNoble v. Justiniano*, 70 Cal. 395, 11 Pac. 742.

²¹³ The older cases are collected in case cited below from 3 Pet. See *Graham v. Moore*, 4 Serg. & R. 467; *Kane v. Bloodgood*, 7 Johns. Ch. 90; also, a case in Cowp. p. 217. *Willison v. Watkins*, 3 Pet. 43, compares the cotenant's duty to his companion to that of the lessee to his landlord.

²¹⁴ *Cutting v. Derby*, 2 W. Bl. 1077; *Jones v. Cohen*, 82 N. C. 75; *Allen v. Salinger*, 103 N. C. 18, 8 S. E. 913 (denial of plaintiff's title justifies suit); *St. Louis Ry. Co. v. Prather*, 75 Tex. 53, 12 S. W. 969. See Code Civ. Proc. N. Y. § 1515.

pernancy of profits are not in a position to bring an ejectment or other real action, the "statute" cannot run against them. Only when they are "ousted" their right to bring such an action accrues. Only from the time of such ouster the bar of limitation runs. And it is often hard to tell when the ouster took place and the statute began to run; and it must be left to the jury as a question of fact.²¹⁵ But there is this principle: There must be a clear, open, notorious act by the party in possession, such an act as his companions can understand, showing that he holds no longer for them as well as for himself.²¹⁶ A demand by them, and refusal on his part, to let them into the joint enjoyment, is sufficient.²¹⁷ Some of the author-

²¹⁵ Doe d. Fishar v. Prosser, 1 Cowp. 217; Doe d. Hellings v. Bird, 11 East, 49; Clapp v. Bromagharn, 9 Cow. 530; Alvarado v. Nordholt, 95 Cal. 116, 30 Pac. 211; Christy v. Spring Valley Waterworks, 97 Cal. 21, 31 Pac. 1110; Lindley v. Groff, 37 Minn. 338, 34 N. W. 26; Greenhill v. Biggs, 85 Ky. 155, 2 S. W. 774; Thompson v. Gerrish, 57 N. H. 85; Perkins v. Eaton, 64 N. H. 359, 10 Atl. 704; McGee v. Hall, 26 S. C. 179, 1 S. E. 711; Id., 28 S. C. 262, 6 S. E. 566; Berg v. McLafferty (Pa. Sup.) 12 Atl. 460 (burden on defendant); McCloskey v. McCloskey (Pa. Sup.) 16 Atl. 30; Musick v. Barney, 49 Mo. 458 (a private declaration that he deems the property his, insufficient). As to prescriptive right of joint owner in right of way, see Boyd v. Hand, 65 Ga. 468; Bowen v. Preston, 48 Ind. 367 (unless the tenant in possession claims a sole ownership); Long v. McDow, 87 Mo. 197; Fry v. Payne, 82 Va. 759, 1 S. E. 197 (bar of suit for partition).

²¹⁶ Jackson v. Tibbits, 9 Cow. 246 (holding under void partition deed is ouster); Bennett v. Clemence, 6 Allen, 10 (putting up a building for himself is). Contra, Ingalls v. Newhall, 139 Mass. 268, 30 N. E. 96 (fellow tenants having occasional use); Childs v. Kansas City, St. J. & C. B. R. Co. (Mo. Sup.) 17 S. W. 954 (using land for railroad track is); Norris v. Sullivan, 47 Conn. 474; Gordon v. Pearson, 1 Mass. 323 (hindering entry of cotenant); Stevenson v. Anderson, 87 Ala. 228, 6 South. 285 (entering to sell vacant lots in severalty is not); English v. Powell, 119 Ind. 93, 21 N. E. 458 (nor keeping an agent on wild lands); Rodney v. McLaughlin, 97 Mo. 426, 9 S. W. 726 (nor getting all the rents from the collector); Fenton v. Miller, 94 Mich. 204, 53 N. W. 957 (acquiescence of brothers and sisters, not an ouster); Annely v. De Saussure, 26 S. C. 497, 2 S. E. 490 (possession of wharf exclusive); Hudson v. Coe, 79 Me. 83, 8 Atl. 249 (of wild lands can hardly be); Perkins v. Eaton, 64 N. H. 359, 10 Atl. 704; Morris v. Davis, 75 Ga. 169.

²¹⁷ Doe d. Hellings v. Bird, supra; Jordan v. Surghnor, 107 Mo. 520, 17 S. W. 1009. See, also, Dubois v. Campau, 28 Mich. 304; Campau v. Dubois, 39 Mich. 274; Parker v. Proprietors of Locks & Canals, 3 Metc. (Mass.) 91; Rickard v. Rickard, 13 Pick. 251.

ties go so far as to require actual knowledge, if not a deliberate giving of notice, to the cotenants out of possession, to constitute an ouster which will set the statute to run.²¹⁸

A conveyance by the owner of a share of the whole estate, and delivery of possession of the whole, is an ouster, though, in the eye of the law, the purchaser himself becomes a tenant in common with the other joint owners.²¹⁹ But a purchaser whose deed gives him only an undivided share does not hold adversely till he commits an open act of ouster.²²⁰ And, when a deed apparently conferring a fee in severalty is set aside by judgment or decree, the grantee's possession again becomes amicable.²²¹ However, this requirement of a notorious act of ouster may lead to great hardship. Hence, when the possession has for a very long time been exclusive, with all the indicia of sole ownership, and a full acquiescence of the other

²¹⁸ *Hignite v. Hignite*, 65 Miss. 447, 4 South. 345; *Northrop v. Marquam*, 16 Or. 173, 18 Pac. 449; *Culver v. Rhodes*, 87 N. Y. 348, where the authorities are brought down (notice must be brought home of an actual, continued, visible, notorious, distinct, and hostile possession). Same principle, *Packard v. Johnson*, 57 Cal. 180. *Contra*, *Greenhill v. Biggs*, 85 Ky. 155, 2 S. W. 774 (notice needless); *Peck v. Lockridge*, 97 Mo. 549, 11 S. W. 246 (notice need not be personal).

²¹⁹ *Doe dem. Reed v. Taylor*, 5 Barn. & Adol. 575. In this case one coparcener made a feoffment with livery of seisin, purposely to create a disseisin,—the highest grade of adverse possession. There is a learned discussion whether the livery of seisin was valid, because everybody had not been cleared out of the house when the ceremony was gone through. *Bradstreet v. Huntington*, 5 Pet. 402; *Rutter v. Small*, 68 Md. 133, 11 Atl. 698 (where the contrary decisions in *Seaton v. Son*, 32 Cal. 481, and *Holley v. Hawley*, 39 Vt. 525, were quoted for plaintiff, but were rightly disregarded); quoting *Townsend's Case*, 4 Leon. 52, where one coparcener made a fee by disseisin. Same principle, *Winterburn v. Chambers*, 91 Cal. 170, 27 Pac. 658; *Lenoir v. Mining Co.*, 106 N. C. 473, 11 S. E. 516 (cotenant himself gains adverse possession when entering on sole title); *Contra*, *Richards v. Richards*, 75 Mich. 408, 42 N. W. 958 (not under tax title gotten in subsequently); *Odom v. Weathersbee*, 26 S. C. 244, 1 S. E. 890. See an exception on equitable grounds in *Hicks v. Bullock*, 96 N. C. 164, 1 S. E. 629.

²²⁰ *Culley v. Taylerson*, 11 Adol. & E. 1008, contains a valuable discussion on the workings of the English limitation act of 3 & 4 Wm. IV. c. 27.

²²¹ *Hall v. Hall*, 27 W. Va. 468, 480 (where a judicial sale and deed thereunder were set aside); *Stewart v. Stewart*, 83 Wis. 364, 53 N. W. 686 (the case was, however, decided under the Wisconsin 10-year law).

joint owners, an ouster has been inferred; for instance, where the defendant had possession for 40 years, or, in a state with a 10-years bar, where the exclusive possession had lasted for 30 years.²²² In North Carolina, where a possession under "paper title" becomes a bar in seven years, a tenant in common cannot, when he has entered for himself and fellows, acquire a paper title of any kind, so as to bring himself, as against them, within the short limitation.²²³ And it has been held elsewhere that one who holds adversely to all the world ceases, by accepting a joint conveyance to himself and others, from that time onward, to hold adversely to these.²²⁴ But under the general limitation law, a cotenant may buy in an outstanding title, and under it hold adversely to his companions.²²⁵ On the other hand, when one of several coheirs, or, generally, cotenants, conveys by deed the whole fee, his grantee, by entering on the land alone, holds adversely to his grantor's cotenants; and no other facts or expressions in words need be shown for that purpose.²²⁶ But one who buys the cotenant's estate at an execution sale is supposed to know that he buys an undivided share only. He becomes a cotenant himself, and his possession becomes adverse only by subsequent conduct.²²⁷

In those states in which "color of title," or "colorable title," or "written evidence," with seven years' possession, makes a good bar, cotenants can, of course, not lose their shares by mere ouster dur-

²²² *Vandyck v. Van Beuren*, 1 Caines, 83. In *Mayes v. Manning*, 73 Tex. 43, 11 S. W. 136, a persistent denial was deemed enough. *Bradstreet v. Huntington*, *supra*. Same principle, *Gray v. Givens*, 2 Hill, Eq. 513, 514.

²²³ *Page v. Branch*, 97 N. C. 97, 1 S. E. 625; *Jeter v. Davis*, 109 N. C. 458, 13 S. E. 908 (where the part owner was a cestui que trust, trying to hold against his trustee); *Hicks v. Bullock*, *supra*. Extended to the cotenant's grantee in *Caldwell v. Neely*, 81 N. C. 114.

²²⁴ *Cook v. Clinton*, 64 Mich. 309, 31 N. W. 317 (the position in the text was admitted to be correct, but could not be applied to the facts of the case).

²²⁵ *Tisdale v. Tisdale*, 2 *Sneed*, 598; *King v. Rowan*, 10 *Heisk*, 675.

²²⁶ *King v. Carmichael*, 136 Ind. 20, 35 N. E. 509 (approving *Freem. Coten. § 223*); *Nelson v. Davis*, 35 Ind. 483; *Wright v. Kleyla*, 104 Ind. 227, 4 N. E. 16; *Jackson v. Smith*, 13 Johns. 411. And see cases under the seven-year laws of Illinois and North Carolina, in section on "Short Limitations"; such deed serving as color of title.

²²⁷ *Page v. Branch*, 97 N. C. 97, 1 S. E. 625.

ing this short term, unless the cotenant in possession conveys or devises the whole estate. Unless he does so, they can only lose their interest by an ouster for 20 years or other long term.²²⁸

The cotenant who, with his own money, causes a friend to buy the land for him at a tax sale, acquires the tax title for his companion; and, retaining possession, he or his friend can turn the rights of the other cotenant into a "resulting trust," which would be barred by shorter period than the usual time.²²⁹ In determining whether the other joint owners have notice of the hostile acts of him who is in possession, and thus to determine whether there was an ouster, the condition of the other owners, such as their infancy or absence from the state, may be taken into consideration.²³⁰ When there is any "color" of a partition in writing, either judicial or in pais, and one of the joint owners takes possession of what seems to be his purpart, the possession so taken is always adverse, and ripens in due time into a title.²³¹

The law is very unfavorable to a tenant, actually holding under a lease, written or oral, who, upon any ground, seeks to throw off his duty to the landlord and set up an adverse possession against him. In fact, all amicable possessions are considered such, on the ground that the occupant is a quasi tenant of the true owner. If the occupant is really his tenant, he can, under the older law, never hold adversely until he has restored to the landlord the possession obtained from him by friendly means; for, else, the friendly act would become treacherous, and the landlord's confidence be turned against him.²³² Several of the states have legislated on the subject. Thus, in New York, the tenant must have remained in possession for 20 years, without payment of rent or other recognition of duty, before the statute begins to run in his favor; in other words, the bar of 20

²²⁸ *Linker v. Benson*, 67 N. C. 150; *Neely v. Neely*, 79 N. C. 478; *Ward v. Farmer*, 92 N. C. 93; *Day v. Howard*, 73 N. C. 1.

²²⁹ *Tanney v. Tanney*, 159 Pa. St. 277, 28 Atl. 287. Generally speaking, buying in a tax title is considered a fraud on the cotenants, and will not start limitations against them. *Maul v. Rider*, 51 Pa. St. 377.

²³⁰ *Killmer v. Wuchner*, 74 Iowa, 359, 37 N. W. 778.

²³¹ *Den v. Kelty*, 1 Harr. (16 N. J. Law) 517. See the distinction there against parol partition.

²³² Compare *Willison v. Watkins*, *supra*, note 213; and compare some of the statutes referred to in chapter 5, § 60 (Champerty).

years is doubled into 40. And similar statutes have been enacted in Wisconsin, North Carolina, South Carolina, Nevada, Idaho, and California, doubling in like manner the ordinary bar, when sought to be enforced by the tenant against his landlord.²³³ Some courts have gone so far as to hold that not only a tenant, but one who derives his possession from a tenant, cannot set up the ordinary bar of limitation against the landlord.²³⁴ Altogether the instances where ordinary tenants, holding under leases of husbandry in the country, or renters of houses in the city, have held over so long without payment of rent or acknowledgment, as to raise any question of limitation, have been exceedingly rare; but it happened oftener that one holding land adversely to the true owner would by way of compromise accept a short lease from him, and hold on after its expiration. The possession which an avowed trustee, or one whom the law against his will considers a trustee, holds against those beneficially interested, will be treated under the head of "Limitation and Laches in Equity."

§ 184. Tacking.

It is often stated, as the effect of the statute of limitations, that when the defendant and those under whom he claims have been in adverse possession for 20 years, or other statutory period, he cannot be disturbed; in other words, that the defendant can "tack" his own possession to those preceding him from whom he derived it. Where the defendant is the heir of his predecessor in possession, and he of the next before him, the right to tack is undoubted, and reaches back to the common-law doctrine under which the disseisor's death and descent cast upon his heir conferred even greater rights upon the latter than the disseisor himself had enjoyed.²³⁵ But

²³³ New York, Code Civ. Proc. § 373; Wisconsin, § 4216; North Carolina, § 147; South Carolina, § 106; Nevada, § 3640; Idaho, § 4044; California, § 326.

²³⁴ Tompkins v. Snow, 63 Barb. 525.

²³⁵ At common law the disseisor's position was strengthened by a descent cast on his heir, or by his feoffment. Section 368 of the New York Code of Civil Procedure would, if literally followed, allow all hostile possessions to be tacked, for the plaintiff is not to sue unless he has been seised within 20 years. "It is admitted that possession will descend to the heir without interrupting the bar." McNeely v. Langan, 22 Ohio St. 32. In Tennessee see distinctions

where the transmission is by deed there was at one time a grave doubt whether a trespasser had any rights which he can transmit by his grant; and in South Carolina the decisions to that effect seem never to have been overruled,²³⁶ and not to have been more than shaken in Tennessee.²³⁷ A distinction has been drawn at least in Tennessee, between an intruder or trespasser who has no color of title, and one who holds under an ineffectual deed or devise. The latter's possession can be tacked to that of his grantee, but the former's possession cannot.²³⁸ But the better opinion, the one which now generally prevails, is this: Whenever A has a possession so far adverse that it would ripen into a title in him in the statutory time, B, who derives title and possession from him in any lawful way,—that is, by grant, lease, devise, descent, courtesy, or dower,—can add up A's years of possession with his own.²³⁹ A gap in point of time between the former's possession and the latter

infra. In Texas the statute (article 3199) demands "privity" among those whose possessions are to be tacked.

²³⁶ King v. Smith, 11; Beadle v. Hunter, 3 Strob. 331. Judge Washington also took this extreme view in Potts v. Gilbert, 3 Wash. C. C. 479, Fed. Cas. No. 11,347; but it is not law in Pennsylvania.

²³⁷ Marr v. Gilliam, 1 Cold. 491, declaring that heirs may connect with their ancestor, but widow cannot, and speaking of the older decisions in that state against tacking among wrongdoers, when applied to land cases, as only dicta, is criticised by Chief Justice Nicholson in Baker v. Hale, 6 Baxt. 47. Erck v. Church, 87 Tenn. 580, 11 S. W. 794, approves the former. Nelson v. Trigg, 4 Lea, 701, takes the ground that a mere trespasser's possession cannot be tacked, while, according to Clark v. Chase, 5 Sneed, 637, that of a fraudulent grantee may be.

²³⁸ On account of different wording of sections 3459 and 3461 of the Code, both limiting the bringing of the action to seven years: see Hammett v. Blount, 1 Swan, 385; Crutsinger v. Catron, 10 Humph. 24, 30. But in North Carolina the statute counts the possession of the defendant and "those under whom he claims" in either case. See sections 141 and 144.

²³⁹ Overfield v. Christie, 7 Serg. & R. 173; Moore v. Small, 9 Pa. St. 194; Gage v. Gage, 30 N. H. 420; Leonard v. Leonard, 7 Allen, 277. And this is the doctrine of elementary writers, such as Adams, Ej. p. 47. The buyer at a sheriff's or judicial sale can tack with the defendant in execution, etc. Hall v. Hall, 27 W. Va. 468. An invalid sheriff's deed was held insufficient in Hester v. Coats, 22 Ga. 56. The execution purchaser was allowed to tack the debtor's possession in a suit brought by that debtor after he had bought in the paramount title. Miller v. Bumgardner, 109 N. C. 412, 13 S. E. 935.

would stand on the same ground as a break of continuity in the occupancy by one person.²⁴⁰

But when the later possessor has not received the land from the earlier in a way which would transfer good title, if such there had been,—that is, by the true line of descent, by a valid devise, by a deed good in law, etc.,—opinions are much divided as to the effect. It has been argued that the later possessor must be looked on as a new trespasser. On the other hand, it has been insisted that one claiming under paramount title has no right to scan the manner in which the possession was transmitted from one of his adversaries to the other, if it was actually transmitted, though only by word of mouth or informal understanding.²⁴¹ Thus, it has been held in Illinois, on the authority of an old Connecticut decision, that a transfer of the land with delivery of possession is enough to justify tacking; and this is now the settled doctrine in that state.²⁴² In Missouri, also, and in Oregon, where “privity of estate” between the older and younger possessors is required, no “paper evidence” of the transfer is needed.²⁴³ In North Carolina one holding land under title bond can tack with his vendor, and justly, for at law he is simply the latter’s tenant at will, and his possession is that of the latter.²⁴⁴ In Ohio the land may pass by deed, or by will, or by any agreement, written or verbal, and enough privity is recognized between the successive parties to tack their occupancies. In Texas and in Minnesota, also, a donee by verbal gift may tack his donor’s time.²⁴⁵ It was held, in an early Kentucky case, where B recovered

²⁴⁰ Louisville & N. R. Co. v. Philyaw, 88 Ala. 264, 6 South. 837; Warren v. Frederichs, 76 Tex. 647, 13 S. W. 643 (intrusion of stranger).

²⁴¹ Erck v. Church, *supra*, gives a summary of cases, especially in Tennessee, on all sides of the question.

²⁴² Weber v. Anderson, 73 Ill. 439; Schneider v. Botsch, 90 Ill. 577; Faloon v. Simshauser, 130 Ill. 649, 22 N. E. 835,—all in accord with Fanning v. Wilcox, 3 Day, 258 (possession may pass by any understanding).

²⁴³ Crispin v. Hannavan, 50 Mo. 536; Vance v. Wood, 22 Or. 77, 29 Pac. 73 (approved in Rowland v. Williams, 23 Or. 515, 32 Pac. 402). But in Low v. Schaffer, 24 Or. 239, 33 Pac. 678, a parol transfer was deemed no more than a new trespass.

²⁴⁴ Brown v. Brown, 106 N. C. 451, 11 S. E. 647.

²⁴⁵ McNeely v. Langan, 32 Ohio St. 3 (“the mode of transfer may give rise to questions between the parties to it; but with respect to the rights of third

from C on an older entry, and was afterwards sued by A, who held a patent superior to both, that he could tack C's possession to his own. A parol transmission in this state also justifies tacking.²⁴⁶ In a leading New York case the distinction has been drawn that while a "pedis possessio" may be brought down by a void or faulty deed, a mere constructive possession of vacant land, through the occupation of a small part, cannot be so transferred,—a needless refinement on a subject already too complex.²⁴⁷ In New Hampshire, Massachusetts, and lately in New York, a possession which does not follow regular steps of descent or purchase cannot be tacked; but in the cases which were passed upon the later possessor could not always show even a parol transfer from the party before him.²⁴⁸

For the distinction between the *pedis possessio*, and one only constructive, it may be said: As the constructive possession rests only on the written description of boundaries, it is quite proper that it should only be transmitted by writing; though it need not necessarily be a valid grant, and though the grantee did hold on beyond the term or estate conferred upon him.²⁴⁹

In those states in which the proceedings for the collection of taxes are in rem, the title of the buyer at the tax sale is not derived from the delinquent. Hence, when the former enters upon the latter's land, the possessions cannot be tacked, and if the tax deed turns out to be void, the holder of the paramount title is not barred by the conjoined lapse of time.²⁵⁰

persons it seems to be immaterial, if successive transfers of possession were in fact made, whether they were effected by," etc.). Same principle, *Mexia v. Lewis*, 3 Tex. Civ. App. 113, 21 S. W. 1016; *Sherin v. Brackett*, 36 Minn. 152, 30 N. W. 551.

²⁴⁶ *Shannon v. Kinney*, 1 A. K. Marsh. 3. The possession of mere squatters inures to the true owner. *Bell v. Fry*, 5 Dana, 341. The occupants must show connection, *Botts v. Shields*, 3 Litt. 31; though by parol, *Com. v. Gibson*, 85 Ky. 666, 4 S. W. 453.

²⁴⁷ *Simpson v. Downing*, 23 Wend. 316.

²⁴⁸ *Locke v. Whitney*, 63 N. H. 597, 3 Atl. 920; *Bailey v. March*, 3 N. H. 275; *Sawyer v. Kendall*, 10 Cush. 241 (widow retaining possession); *Vance v. Fisher*, 10 Humph. 212 (grantee of old occupant's administrator). Contra, it is pointed out in *Hickman v. Link*, 97 Mo. 482, 10 S. W. 600, that the widow before assignment of dower is possessed on behalf of the heirs, and therefore may tack.

²⁴⁹ *Melvin v. Proprietors*, 5 Metc. (Mass.) 15; *Kendrick v. Latham*, 25 Fla. 819, 6 South. 871; *Cooper v. Ord*, 60 Mo. 420.

²⁵⁰ *Maxwell v. Higgins*, 38 Neb. 671, 57 N. W. 388.

However the states may differ in defining the manner in which the land may be transmitted, they all agree that there must be "privity" among the successive possessors; and that the burden of proving this privity lies on him who relies on it.²⁵¹

A vendee by title bond, who has not paid, may be treated as a quasi tenant at will of his vendor, and his possession, when he abandons the land again, counts as that of his vendor, who has retained such title as he has.²⁵²

The same society (religious or the like), being incorporated under two charters at different times, may tack its holding in one capacity with the other.²⁵³ But it may happen that the same person cannot count the whole time of his own possession where he has held by inconsistent titles.²⁵⁴ But the time during which a donee holds under a parol gift and that during which he holds afterwards under an ineffectual deed may be tacked; that is, the acceptance of the deed is not an abandonment of the former possession.²⁵⁵

In Illinois, in three classes of cases, the law matures a possession or claim after a lapse of seven years, as will be shown in the section on "Short Limitations." Each clause granting this short bar is followed by a direction that the heirs, devisees, or assignees (or those claiming by descent, devise, or purchase) may tack their times with those preceding them in estate; and it would seem that, under these statutes, an irregular turning over of the land to one neither heir, devisee, nor purchaser would be unavailing.²⁵⁶

²⁵¹ *Core v. Faupell*, 24 W. Va. 246; *Lucy v. Tennessee & C. R. Co.*, 92 Ala. 246, 8 South. 606; *Jarrett v. Stevens*, 36 W. Va. 445, 15 S. E. 177 (where Hutch. Va. & W. Va. Land Titles, § 338, is quoted).

²⁵² *Mabary v. Dollarhide*, 98 Mo. 198, 11 S. W. 611.

²⁵³ *First Soc. of M. E. Church v. Brownell*, 5 Hun, 464.

²⁵⁴ *Heflin v. Burnes*, 70 Tex. 347, 8 S. W. 48. But the occupant may buy up one adverse title without discontinuing his adverse holding against another. *Dean v. Goddard*, 55 Minn. 290, 56 N. W. 1060; *City of St. Paul v. Chicago, M. & St. P. Ry. Co.*, 45 Minn. 387, 48 N. W. 17; *Carson v. Dundas*, 39 Neb. 503, 58 N. W. 141 (where in a previous land suit the defendant recovered on a lien for improvements, and the possession was partly under this judgment).

²⁵⁵ *Sanders v. Logue*, 88 Tenn. 355, 12 S. W. 722.

²⁵⁶ *Rev. St. Ill. c. 83, §§ 5-7; Riggs v. Girard*, 133 Ill. 619, 24 N. E. 1031 (the widow's possession and payment of taxes are imputed to the children and heirs). Same principle, *Martin v. Judd*, 81 Ill. 488 (and this ought to be the general rule).

On the other hand, where a "grant is presumed" against the commonwealth, as it was in North Carolina under the statute of presumptions, etc., before the present Code, it is enough that land of which no grant can be found has for the statutory time been held in private occupation; and no privity of estate between the successive holders need be shown.²⁵⁷

Where one holding land under a written instrument occupies more than his deed calls for, and conveys by the boundaries named in his deed, the grantee cannot tack the grantor's possession of the surplus land which belongs to another,—at least, the deed alone will not authorize him to do so, as it raises no privity as to that land.²⁵⁸ But where the deed professes to convey a lot and house thereon, and part of the house stands on a strip which belongs to a neighboring owner, this ground is held to pass by the deed, and the possession thereof by grantor and grantee is tacked.²⁵⁹

Where otherwise allowable, possessions in privity may be tacked to make up the short bars, which will be treated in two later sections.²⁶⁰ We subjoined in a note a few other cases on the transmission, which authorizes tacking, which cannot be easily grouped.²⁶¹

§ 185. Extent of Possession.

Where a man gains an entry into land by "color of title,"—for instance, under a deed from a grantor who is not the owner, or only a

²⁵⁷ Davis v. McArthur, 78 N. C. 357.

²⁵⁸ Graeven v. Diees, 68 Wis. 317, 31 N. W. 914; Ablard v. Fitzgerald, 87 Wis. 516, 58 N. W. 745; Dhein v. Beuscher, 83 Wis. 316, 53 N. W. 551.

²⁵⁹ Neale v. Lee, 19 D. C. 5.

²⁶⁰ Shown incidentally in many of the cases cited in sections 186 and 187. So, also, Brownson v. Scanlan, 59 Tex. 228.

²⁶¹ Costello v. Edson, 44 Minn. 135, 46 N. W. 299. Same point left open in Wren v. Parker, 57 Conn. 529, 18 Atl. 790. In Missouri any transmission, though unsupported by deed or law of descent, is enough. St. Louis v. Gorman, 29 Mo. 593. In Georgia, on the other hand a void grant (e. g. an unauthorized sheriff's deed) prevents tacking. Hestor v. Coats, 22 Ga. 56. No privity between one claiming to be life tenant and his reversioner. Austin v. Rutland R. Co., 45 Vt. 215; Haynes v. Boardman, 119 Mass. 414. Privity between successive holders is also made the test in Lea v. Polk Co. Copper Co., 21 How. 493; Christy v. Alford, 17 How. 601.

life tenant attempting to convey in fee, or under a deed void on its face or by reason of facts outside of it, or in pursuance of a void decree of court, or of a decree that has since been reversed,—the deed, decree, or other written instrument generally contains a description of the land, either by metes and bounds, or by some generic name, or by reference to some writing which is of public record. Now, if he incloses or cultivates a part of this land, while the rest remains “wild” or vacant, and is not in any wise occupied, either by the true owner or by others, the possession of the inclosed or cultivated part draws to it all the residue of the tract.²⁶² This doctrine is almost or quite unknown in England, mainly for want of the wild lands to which it is generally applied, but is firmly established in all the American states.²⁶³

We have already spoken of “color of title,” as defined by state laws which make it an element of a shorter prescription; also, as helping to determine whether a possession is hostile. But its weightiest function comes in when a bodily possession of small extent is to be extended over wider boundaries. Several definitions are collated by Wallace & Hare, and their successors, in the notes to *Nepean v. Doe*: “It is such title as is, in appearance, good and sufficient, but which in reality is not good and effective,”—one of them,²⁶⁴ which is hardly correct; for a deed bad on its face (e. g. a married

²⁶² *Young v. Withers*, 8 Dana, 165, is perhaps the strongest example of “constructive” possession; for a person who had gotten two adjoining patents, and had inclosed a part of one of them only, was held to be possessed adversely to the boundaries of both. This case will be seen to be not in harmony with one of the rules that prevail in most of the states. A junior patent (which is a deed from a body not owning the land) and an ineffective deed equally give rise to color of title and the constructive possession of the whole. *Thomas v. Harrow*, 4 Bibb, 563. A general description, such as “Canary Island,” which can be made certain by parol evidence, is enough. *Lewis v. John L. Roper Lumber Co.*, 113 N. C. 55, 18 S. E. 52.

²⁶³ *Jackson v. Woodruff*, 1 Cow. 276, 286; *Jackson v. Oltz*, 8 Wend. 440. Made part of the New York Revised Statutes, thence transferred to the Code of Civil Procedure. The Georgia Code gives a concise definition in two sections. Section 2680: “Actual possession by inclosure, cultivation,” etc. Section 2681: “Constructive possession is where a person having paper title to land has actual possession of a part; the law construes his possession to extend to the boundary.”

²⁶⁴ *Baker v. Swan’s Lessee*, 32 Md. 355.

woman's deed, unacknowledged or not signed by her husband) may yet serve as color of title. "It implies that some act has been done, or some event has occurred, by which some title, good or bad, has been conveyed." This may be right when color of title is shown as proof of a hostile holding; but as the event might be a descent or the devise of a testator's whole estate, there would be no written description,—no boundary to which to extend.²⁶⁵ A third definition, and perhaps the best for our present purpose, is this: "Color is anything in writing which serves to define the extent of the claim," or "it is a writing upon its face professing to pass title, but which does not do it," etc. But other decisions carry the element of good faith into the definition; thus, one who buys, from a mere squatter, more than the spot which his vendor occupies, cannot prescribe for the vacant land which he knows he has not bought.²⁶⁶ New York and the states sharing its statute law on this topic have given to it this form: "Where there has been a continual occupation and possession of the premises included in such instrument," etc., "or of some part of such premises," etc., "the premises so included shall be deemed to have been held adversely; except when the premises," etc., "consist of a tract divided into lots, the possession of one lot shall not be deemed possession of any other," etc. "Where a known farm or single lot has been partly improved, the portion of the farm or lot that has been left not cleared, or not inclosed, according to the usual course," etc., "is deemed to have been occupied for the same length of time."²⁶⁷ These statutes, like the rule in force in New York before their enactment, apply only to farms or other lots

²⁶⁵ *Mylar v. Hughes*, 60 Mo. 105. The annotators of Smith's *Leading Cases* call this the least precise, but the safest, of the definitions.

²⁶⁶ *Field v. Boynton*, 33 Ga. 239; *Beverly v. Burke*, 9 Ga. 440. These definitions lay stress on the "writing." A late case of a decree of court serving as such writing is *Dougherty v. Miles*, 97 Cal. 568, 32 Pac. 597. Another decision in the same volume (*Christy v. Spring Valley Waterworks*, 97 Cal. 21, 31 Pac. 1110) reminds the reader that color of title never takes the place of or proves possession, but, under section 322 of the California Code of Civil Procedure, only extends it when it exists. The remark in *Langdon v. Templeton*, 66 Vt. 173, 28 Atl. 866, which seems to require marked boundaries of the wider tract, besides the written description, is but an obiter dictum.

²⁶⁷ Code Civ. Proc. N. Y. §§ 369, 370. See Codes of California and other states, at places cited in note 145 to section 181.

under a single management; not to wide tracts of country, not bought for cultivation, the second clause of the statute being understood as narrowing the first. Such—among other states—has been the construction in Wisconsin.²⁶⁸ Moreover, another clause of the New York and kindred statutes confines the possession arising from the use of a lot for the supply of fuel or of fencing timber to the land so used, and extends such possession only as consists in cultivation, improvement, or substantial inclosure.²⁶⁹

In the states which have not regulated this matter by statute, the rule is unrestricted; and whatever is ‘actual possession’ extends itself over the whole tract, though it be one of thousands of acres, such as the states used to grant or sell under their crude land systems, among which the Virginia act for the sale of the lands on the Western rivers was the most mischievous, in the crop of litigation which sprang from it. In Virginia and West Virginia, constructive possession is carried the furthest, for the occupancy of a part of one tract extends itself, not only over that tract, but over adjoining tracts held by the owner under another deed. In Texas, also, there has always been a wide constructive possession.²⁷⁰ Kentucky, which comprised the richest of those western lands falling under the Virginia act, had most opportunity to apply the rule. “Laps” or “interferences” were made by the surveys, of all shapes and sizes, which were laid on the land regardless of those preceding them, known as “gores” when triangular in shape; while sometimes the whole of the younger patent might be contained in the elder, or vice versa. The

²⁶⁸ Jackson v. Woodruff, *supra*; Thompson v. Burhaus, 61 N. Y. 52, 79 N. Y. 93; Pepper v. O'Dowd, 39 Wis. 538. Section 4208 of the Wisconsin Statutes, under which one who or whose ancestor has not been seised within 20 years cannot plead his title in defense, is not affected by these provisions.

²⁶⁹ Code Civ. Proc. N. Y. § 370 (“the portion of the farm or lot that has been left not cleared,” etc.), construed in Wheeler v. Spinola, 54 N. Y. 377; Robinson v. Phillips, 56 N. Y. 634.

²⁷⁰ We may refer to Hutchinson's Land Laws of Virginia and West Virginia, §§ 414, 415, and, among cases there cited, to Overton v. Davisson, 1 Grat. 211, and Garrett v. Ramsey, 26 W. Va. 370. See, also, Oney v. Clendenin, 28 W. Va. 35, 52; Adams v. Alkire, 20 W. Va. 480. A public survey gives the necessary color of title. Whitehead v. Foley, 28 Tex. 292. Other early cases in that state are Wofford v. McKinna, 23 Tex. 46, and, in the United States supreme court, Pillow v. Roberts, 13 How. 472.

possession of a small tilled or fenced plot of the junior patentee would then be extended to his whole survey or patent, unless the senior patentee also had a pedis possessio within the lap, in which latter case the junior patentee was restricted to what he had in bodily possession, and, as to the unoccupied land, the possession would "follow the title"; that is, be ascribed to the true owner.²⁷¹ In one Kentucky case, possession was extended, without any written color of title, to the "marked boundary;" that is, the line of forest trees notched or "blazed" by the surveyor in the manner usual for that purpose. But this view is not accepted elsewhere.²⁷² And generally, when one claims under the same deed, or under several, one tract, or several contiguous tracts, and has a good title to part of the one tract, or to one of the several tracts, his inclosure on the tract or part of tract of which he is the true owner is not extended to lands of which he is not the owner.²⁷³ In states not governed by the New York statute (for instance, in Georgia), possession of a tract which is described in the deed giving color of title as made up of several lots may be held by an inclosure of one of them.²⁷⁴ But whenever the inclosure is separated from part of the tract by land owned under another title, or when the possessor has sold part of the lot, so as to

²⁷¹ Kentucky cases in note 262, *Trimble v. Smith*, 4 Bibb, 257 (inclosure in undisputed part does not reach the lap); quoting Co. Litt. 15b (disseisin never presumed); *Fox v. Hinton*, 4 Bibb, 559 (inclosure partly within the lap does extend over it; inclosure on undisputed part does not aid the true owner); *Gregory v. Ford*, 5 B. Mon. 471, 478; *Farmer v. Lyons*, 87 Ky. 421, 9 S. W. 248 (strongest case on the side of true owner). The same doctrine as to the lap (here called lappage) is found in *Asbury v. Fair*, 111 N. C. 251, 16 S. E. 467.

²⁷² *Campbell v. Thomas*, 9 B. Mon. 83. Contra, *Whitehead v. Foley*, 28 Tex. 292, based on *Miller v. Shaw*, 7 Serg. & R. 129, 137, and other Pennsylvania cases.

²⁷³ *Word v. Box*, 66 Tex. 596, 3 S. W. 93.

²⁷⁴ *Johnson v. Simerly*, 90 Ga. 612, 16 S. E. 951; *Parker v. Jones*, 57 Ga. 204. And see *Young v. Withers*, *supra*. But where the deed grants two tracts which adjoin, but does not show that they do, an inclosure within one is not extended. *Griffin v. Lee*, 90 Ga. 224, 15 S. E. 810. A strong case is *Hickman v. Link*, 97 Mo. 482, 10 S. W. 600, where the vendor's possession of part was allowed to cover the part abandoned by his vendee. As to several lots, see, contra, *Schultz v. Lindell*, 30 Mo. 310; *Grimes v. Ragland*, 28 Ga. 123; *Barber v. Shaffer*, 76 Ga. 285.

separate the inclosure from the rest of his claim, the possession extends beyond the inclosure only to the nearest boundary. It cannot be lifted over and across land either avowedly owned or possessed by others.²⁷⁵

The claimant may effect the bodily possession which he proposes to extend to the boundaries of his deed as well through his tenants as through himself, but when the tenant has a written lease neither the tenant's nor his landlord's constructive possession can reach beyond the boundaries named in that lease.²⁷⁶ The inclosure of a very small plot (say, an acre or two) in one corner, out of several hundred, where the evident end and aim are to get the constructive possession of the whole, rather than the enjoyment of the inclosed part, has been held ineffectual.²⁷⁷ And in most of the states the possession of one tract, or of part of one tract, separately named or described in the deed or other writing through which color of title is derived, does not extend itself constructively to other lots or tracts named or described in the same writing.²⁷⁸ At all events, when a tract is already divided among several owners, one who thereafter takes an unauthorized deed to the whole cannot, by taking and keeping possession of the parcel of one owner for the statutory time, bar the others from their remedy against him.²⁷⁹

A statute peculiar to Texas, and justified by the great expanse of country and scant population of the early days, allows even one who possesses land without any written title or color, but actually occupies a farm, to acquire in 10 years, out of the surrounding wild lands,

²⁷⁵ West v. McKinney, 92 Ky. 638, 18 S. W. 633; Moses v. Gatliff (Ky.) 12 S. W. 139.

²⁷⁶ Craig v. Cartwright, 65 Tex. 424; Jones v. Chiles, 2 Dana, 25, 29. Contra, Hinton v. Fox, 3 Litt. (Ky.) 380 (fifth resolution), says that the tenant having a right to estovers in the adjoining woodlands would by exercising it extend his landlord's possession over them. Scott v. Elkins, 83 N. C. 424, is least favorable to the landlord.

²⁷⁷ In a case under the champerty law (Doe v. Roe, 20 Ga. 183) such an inclosure was deemed a fraud. And in the same state a deed from a mere squatter was held not to give "color of title." Brown v. Wells, 44 Ga. 573 (goes even further). But a strip of 200 acres out of 2,000 is not too little. Grigsby v. May, 84 Tex. 240, 19 S. W. 343.

²⁷⁸ Grimes v. Ragland, 28 Ga. 123; Morris v. McClary, 43 Minn. 346, 46 N. W. 238, quoting Tyler, Ej. 900.

²⁷⁹ Turner v. Moore, 81 Tex. 206, 16 S. W. 929.

a tract of 160 acres, and all the improvements, unless he has a larger area under inclosure.²⁸⁰

§ 186. Short Limitations.

In many of the states—mostly in the West, but not there alone—a possession based either upon color of title in general, or upon title which is defective only in some named particular, or on a mode of conveyance which it is the policy of the law to favor, is protected against the entry or suit of the dispossessed owner after a much shorter period than that which bars the right against a naked possession. The oldest of these privileged possessions are those based upon junior state grants. A law barring, under certain conditions, the claim of the older against that of the younger patentee, was passed in Pennsylvania in 1705, superseded by an act of 1785; in Kentucky in 1809; each fixing seven years as the limit; and there is a similar provision in Tennessee, but there at present the ordinary bar is only seven years. The Kentucky act requires not only cultivation or inclosure, but also settlement; that is, the place in dispute must be the possessor's home.²⁸¹ He must, in Kentucky and Pennsylvania, have a "connected paper title from the commonwealth," which means simply that his title must be perfectly good except in the one respect that the commonwealth has granted the lands in dispute to some one else before they were granted to him, or those from whom he claims. If the grant to him was void, the law does not apply; and in Kentucky it is without benefit to all those who took out patents upon "county warrants" under the law of 1835, which gave the sale of the remaining vacant lands to the several counties, because a clause of the law declares the patent issued upon a county warrant void when the land has been granted before. In short, this class of short limitation has lost all importance.²⁸² The opposite construction of the

²⁸⁰ Rev. St. Tex. art. 3195 (the former law, in Paschal's Digest, had it 640 acres). See *Claiborne v. Elkins*, 79 Tex. 380, 15 S. W. 395.

²⁸¹ Pennsylvania, "Limitations," 2, Act 1785 (the older act, Id. 1, being obsolete); Kentucky, § 2513; Tennessee, §§ 3459, 3460. The new constitution adopted by Kentucky in 1891 introduces another limitation against all claims under Virginia grants, or under Kentucky grants issuing before 1820, of five years.

²⁸² The Kentucky act is construed in *Hunter v. Ayres*, 15 B. Mon. 210; Poage

corresponding law has been reached in Tennessee, and the law is fully alive.²⁸³ In Illinois, when land is "possessed by actual residence thereon for seven successive years, having a connected title in law or in equity, deducible of record, from this state or the United States, or from any public officer * * * authorized by the laws * * * to sell such lands for * * * taxes, or from any sheriff, etc., authorized to sell such land on execution, or under any order, etc., of any court of record," suit must be brought within seven years, after such "title" and such possession concur. Another law cuts the limitation down to seven years when the possession is "under claim and color of title made in good faith for seven successive years," if the possessors shall "during said time pay all taxes legally assessed on such lands"; also, "when a person having color of title made in good faith, in vacant and unoccupied land, shall pay all taxes legally assessed thereon for seven successive years, he shall be deemed * * * the legal owner * * * to the extent of * * *

v. Chinn, 4 Dana, 50; McMillen v. Hutchenson, 4 Bush, 613. These and the older cases apply to this limitation the ordinary rules of tacking (but each of the occupants must have had a "settlement"; i. e. his residence on the land) and of constructive possession to the boundaries. The seven-years clause in the Pennsylvania act dealt only with rights existing in 1788, and is wholly obsolete. The last decision on it is Mickle v. Lucas, 10 Serg. & R. 293.

²⁸³ The Tennessee act (Code, §§ 3459, 3460) is now less important, since the ordinary bar is also seven years. It has, however, given rise to varied and instructive decisions in Tennessee and in the United States supreme court. The possession under the act of 1787 had to be under deed, founded on a grant; since 1819, "deed or assurance of title," now "conveyance, grant, devise, or assurance of title." Under the older cases the possessor had to connect himself with the grant; the statute would only protect the junior against the senior grant. But Judge Catron, in Gray v. Darby's Lessee, Mart. & Y. 396, started a line of decisions to the opposite effect. The land must be "granted" by the state. Thereafter any color by deed, devise, etc., is sufficient. This is followed also in Green v. Neal's Lessee, 6 Pet. 291. A proceeding in partition is assurance of title, Thurston v. University of North Carolina, 4 Lea, 513; so is a descent cast, King v. Rowan, 10 Heisk. 675; a fraudulent deed, Blantire v. Whitaker, 11 Humph. 313; an unregistered deed, Martin v. Pryor, 12 Heisk. 668. Code, § 3459, vests the title in the possessor; section 3460 takes it from the former owner; while the general limitation only affects the remedy. Hence, if a mere trespasser abandons the land after a seven-years possession, the true owner may enter. We have also seen that the trespasser cannot tack with those in privity, nor extend his actual into a constructive possession.

his paper title." In each of the three cases "heirs, devisees, and assigns" or "all holding under such possession by purchase, devise, or descent," may tack to make up the seven years.²⁸⁴ As the state had but little public lands, the object of the first-named clause was not, as that of the Kentucky act of 1809, after which it was framed, to protect the younger against the older patentee, but mainly to give security to tax titles, which, by reason of the many tracts of public land bought by nonresidents and abandoned, became very common. It is admitted that where the tax deed is valid upon its face it becomes the source of a "connected title," within this clause. In a case where the recitals of the deed showed that the sale must have been made a few days too soon, the supreme court of the United States held (against a strong dissent) that the title was not deduced by record. On the other hand, the state supreme court held that a deed by the auditor of land forfeited to the state for nonpayment of tax, made a record title, though the forfeiture on which it rested was unconstitutional.²⁸⁵ But the highest state court held lately that under the law the deed must be "authorized"; hence a sheriff's deed for taxes, founded upon a judgment void for want of notice, and not supported by the purchaser's affidavit, was not authorized, and therefore not the source of a "connected" title.²⁸⁶ Residence cannot be dispensed with for any part of the seven years, but that of tenants or servants is good enough, and one dwelling house will cover several tracts adjoining each other, though held under different titles.²⁸⁷ The law is otherwise construed liberally. The claimant may have only a color of an equitable title; and a court of equity will, in analogous

²⁸⁴ Rev. St. Ill. §§ 4-7. Section 5 is only an incident of section 4; section 4 is always quoted as the act of 1835; while sections 6 and 7 are known as the "Act of 1839." See distinction pointed out in *Stoltz v. Doering*, 112 Ill. 234.

²⁸⁵ *Moore v. Brown* (1850) 11 How. 414. Catron, J., in his dissent, gives vent to the suspicion that the case was gotten up for the opinion of the supreme court. *Woodward v. Blanchard* (1855) 16 Ill. 434, does not refer to the preceding case; *Burton v. Perry*, 146 Ill. 71, 34 N. E. 60, where this, as well as the two other clauses, was relied on.

²⁸⁶ *Van Matre v. Sankey*, 148 Ill. 536, 36 N. E. 628.

²⁸⁷ *Stumpf v. Osterhage*, 94 Ill. 115; *Walker v. Carrington*, 74 Ill. 446 (case of laches in analogy to the statute); *Martin v. Judd*, 81 Ill. 488; *Wharton v. Bunting*, 73 Ill. 16.

cases, hold a delay of over seven years to be laches.²⁸⁸ The two other clauses require that the color of title be obtained in good faith. Such is presumed in the absence of evidence to the contrary. Notice of the adverse title is not in itself proof of bad faith; but obtaining the colorable title at a low price, with a set purpose to rob the true owner of his estate, constitutes want of good faith.²⁸⁹ The payment of all taxes includes those of state, county, and town or other district, regular or special; and no year must be missed; but an illegal tax need not be paid. If the land is exempt from taxation, it cannot be gained under these clauses at all. Seven years must have run from the first payment of tax. The payments made before color was acquired do not avail. The seven years of possession and of taxpaying must concur. The possessor need not make the payments personally. He may borrow from the very owner, whose rights he thereby gains. The burden of proving the payment of taxes is on him who relies on the seven years. He may prove it by the collector's books, by receipts, or by parol; and the taxes for several years may be paid at the same time.²⁹⁰

To make out color of title under the two later laws, no such strictness is called for as under the first. Any deed which purports to pass title, such as an unauthorized tax deed, or a conveyance from one who has no title himself, or a receipt with a

²⁸⁸ *Davis v. Hall*, 92 Ill. 85 (marshal's sealing deed relates back to date); *Martin v. Judd*, *supra* (purchaser under junior execution against one under elder); *Dolton v. Cain*, 14 Wall. 472; *Walker v. Carrington*, *supra*; *Cartwright v. McGown*, 121 Ill. 388, 12 N. E. 737 (this and the two other clauses followed in equity).

²⁸⁹ *Stubblefield v. Borders*, 22 Ill. 279; *Burgett v. Taliaferro*, 118 Ill. 503, 9 N. E. 334; *Fisher v. Bennehoff*, 121 Ill. 426, 13 N. E. 150. Contra, *Bonney v. Stoughton*, 122 Ill. 536, 13 N. E. 833, where the deed from the fraudulent to an honest grantee was held good for the purpose. See *Walcott v. Gibbs*, 97 Ill. 118, for application of seven years to vacant lands; also, *Jandon v. McDowell*, 56 Ill. 53.

²⁹⁰ *Peoria, D. & E. Ry. Co. v. Forsyth*, 118 Ill. 272, 8 N. E. 766; *Burton v. Perry*, 146 Ill. 71, 34 N. E. 60; *Id.*, 126 Ill. 599, 18 N. E. 653; *Wisner v. Chamberlin*, 117 Ill. 568, 7 N. E. 68; *Taylor v. Lawrence*, 148 Ill. 388, 36 N. E. 74; *Robbins v. Moore*, 129 Ill. 30, 21 N. E. 934; *Grant v. Badger*, 128 Ill. 386, 21 N. E. 609; *Timmons v. Kidwell*, 138 Ill. 13, 27 N. E. 756; *Id.*, 149 Ill. 597, 36 N. E. 974; *Hinchman v. Whetstone*, 23 Ill. 185.

description of the land from a United States register of the land office; but the transfer of a mortgage note does not give color; and the deed of an estate to a grantor who remains in possession inures to the grantee, and does not give to the grantor a color of title.²⁹¹ A specific devise of a tract of land is as much color as a deed describing it; but a general or residuary devise by one in possession of the land gives no color whatever.²⁹² And the instrument must clearly describe the thing or interest which it passes. Thus a tax deed which conveys a one undivided half interest cannot be set up as "color" against the owner of one half, unless it appears that his half was sold; a strip adjoining the land described in a deed is not protected by its color; nor any share, estate or interest which it does not purport to convey.²⁹³ The seven-years limitation may be pleaded against a widow claiming dower, counting from the death of the husband; and the title gained is good for attack as well as for defense. It is good enough to support trespass against subsequent intruders.²⁹⁴ The limitation law of Colorado is framed upon the two latter clauses of the Illinois seven-years limitation, known as the "Act of 1839." It was five years

²⁹¹ *McCagg v. Heacock*, 34 Ill. 479; *Chickering v. Failes*, 26 Ill. 519; *Brian v. Melton*, 125 Ill. 647, 18 N. E. 318; *Perry v. Burton* 111 Ill. 138; *Stubblefield v. Borders*, *supra*; *Morrison v. Norman*, 47 Ill. 477; *Sholl v. German Coal Co.*, 139 Ill. 21, 28 N. E. 748; *Sontag v. Bigelow*, 142 Ill. 143, 31 N. E. 674. Contra, *Robbins v. Moore*, *supra*; *Guertin v. Mornbleau*, 144 Ill. 32, 33 N. E. 49. Seven years must run from the delivery of the deed which gives color. *Smith v. Prall*, 133 Ill. 308, 24 N. E. 521. In *Sholl v. German Coal Co.* it was held that a decree against the possessor's right, though erroneous and afterwards reversed would interrupt the colorable possession. Descent does not give color. *Cartwright v. McGown*, 121 Ill. 388, 12 N. E. 737.

²⁹² *Baldwin v. Ratcliff*, 125 Ill. 376, 17 N. E. 794. Contra, *Stoltz v. Doering*, 112 Ill. 234.

²⁹³ *Perry v. Burton*, 111 Ill. 138; *Chicago, R. I. & P. Ry. Co. v. Hardt*, 138 Ill. 120, 27 N. E. 910.

²⁹⁴ *Miller v. Pence*, 132 Ill. 149, 23 N. E. 1030; *Gage v. Hampton*, 127 Ill. 87, 20 N. E. 12; *City of Chicago v. Middlebrooke*, 143 Ill. 265, 32 N. E. 457; *Brian v. Melton*, 125 Ill. 647, 18 N. E. 318. This limitation runs against a married woman; for, having control of her lands, she ought to pay the taxes. *Enos v. Buckley*, 94 Ill. 458. Section S of the chapter on "Limitations" exempts from the operation of sections 6 and 7 infants, insane, those in prison, etc., who have three years after removal of disability in which to sue, and must repay all taxes with 12 per cent. interest.

until 1893, but now seven years; till then there was no more general law on the statute book. The Illinois decisions may be used in its interpretation, and are freely quoted by the supreme court of the state. The colorable title must be based on a writing. Knowledge that such a writing is "not the deed" of the pretended grantor negatives the necessary good faith.²⁹⁵ The seven-years limitation in Florida, which is based on color of title, need not be discussed here, as seven years is the longest and ordinary bar in that state.

Still more important are the short limitations in Wisconsin (ten years) and in North Carolina (seven years), for they govern all possession under color of title; that is, in the former state, "when the occupant, or those under whom he claimed, entered" under claim of title exclusive of any other right, founding [it] "on some written instrument, as * * * a conveyance, or upon the judgment of some competent court" in the latter state, "when the person in possession of any real property, or those under whom he claims, shall have been possessed of the same, under known and visible lines and boundaries, and under colorable title" for seven years.²⁹⁶ These short limitation laws are not to be extended by construction, yet the original owner, who has a paper title, has the benefit of the short term against a purchaser at a tax sale who does not take possession within the term; and, it would seem, against his own grantee or a purchaser at execution or judicial sale who is in like delay. The title claimed need not be a good one, otherwise no limitation at all would be needed. But the deed is "color" only as to the land described therein. What lies beyond the description can be gained only by the 20-years possession. And the claim must otherwise, either in duration or quantity (share or severalty) not exceed the words of the instrument which

²⁹⁵ Colorado, §§ 2186, 2187. As to vacant lands, if one having a better title pays one year's taxes out of the five, the other gets no advantage. The law was passed in 1874. By mistake, "proper title" is written for "paper title." This is immaterial. See Lebanon Min. Co. v. Rogers, 8 Colo. 37, 5 Pac. 661 (suggestion that there might be color without writing). Contra, Knight v. Lawrence, 19 Colo. 425, 35 Pac. 242; Latta v. Clifford, 47 Fed. 618. The amendment from five to seven years was made by act of April 8, 1893.

²⁹⁶ Wisconsin, St. §§ 4210 (presumed from legal title, unless, etc.), 4211; North Carolina, Code, § 141.

gives the title.²⁹⁷ A tax deed, though void upon its face, is good color of title, and so as to other instruments, which apparently confer title. But the possessor must show affirmatively that he claims to hold under the written instrument; otherwise he comes only within the ordinary long limitation.²⁹⁸

In North Carolina, the seven-years bar is open to saving for disabilities. It runs only after the title is out of the state, though the seven years may be part of the thirty on which a grant is presumed. It gives a title on which ejectment may be brought against intruders. It bars a resulting trust, and under it a fraudulent deed with adverse possession bars the grantor's creditors. It supports a constructive possession.²⁹⁹ Any writing gives color which seems to pass the title—e. g. an invalid sheriff's deed (*quære*, whether one void on its face); or a will proved on the attestation of one witness, but not one so attested and not proved. The writing must identify the land, but may do so by a general name if the boundaries indicated thereby are known.³⁰⁰ A mortgage, even before the equity of redemption is released, gives color, upon the old view of mortgages. A cotenant may have color against his

²⁹⁷ *Sydnor v. Palmer*, 29 Wis. 226, 253 (short limitations are not favored). Same principle, *Wilson v. Henry*, 35 Wis. 241. The old owner having paper title can under this law, after 10 years, defeat the tax title. *Wilson v. Henry*, 40 Wis. 594; *Wiesner v. Zaum*, 39 Wis. 188 (deed of entirety is exclusive of cotenants). An execution sale and deed, where the defendant is not the owner, gives color. *North v. Hammer*, 34 Wis. 425; *Childs v. Nelson*, 69 Wis. 125. 33 N. W. 587 (deed gives color to what it describes).

²⁹⁸ *Meade v. Gilfoyle*, 64 Wis. 18, 24 N. W. 413; *North v. Hammer*, *supra*; *Cowly v. Monson*, 5 Fed. 779 (receipt from land office); *Whittlesey v. Hoppenyan*, 72 Wis. 140, 39 N. W. 355 (deed void, and unrecorded).

²⁹⁹ *Johnson v. Parker*, 79 N. C. 475; *Asbury v. Fair*, 111 N. C. 251, 16 S. E. 467 (runs on after disability arises); *Clayton v. Rose*, 87 N. C. 106. *Hamilton v. Icard*, 114 N. C. 532, 19 S. E. 607; *Manufacturing Co. v. Brooks*, 106 N. C. 107, 11 S. E. 456 (title of state); *Neely v. Neely*, 79 N. C. 478; *Hill v. Overton*, 81 N. C. 393; *Syme v. Riddle*, 88 N. C. 463; *Isler v. Dewey*, 84 N. C. 345; *Allen v. Salinger*, 103 N. C. 14, 8 S. E. 913.

³⁰⁰ *Manufacturing Co. v. Brooks*, *supra*; *McConnel v. McConnel*, 64 N. C. 342 (this refers to *Callender v. Sherman*, 5 Ired. 711, and gives a historic sketch of color of title in North Carolina. It is cited approvingly in Illinois); *Dickens v. Barnes*, 79 N. C. 490 (20 acres, more or less, adjoining lands of A. and B.). *Contra*, *Henly v. Wilson*, 81 N. W. 405; *Edwards v. Tipton*, 83 N. C. 479 (mortgage in trust not color).

fellows if he has entered under an independent written title; an alienee of whole estate from a cotenant in sole possession has color; but a deed from a mortgagor, when the mortgage is recorded, gives no color against the mortgagee.³⁰¹

In Georgia, "adverse possession of land under written evidence of title for seven years" gives "title by prescription," unless the "written title be forged or fraudulent, and notice is brought home to the claimant before or at the time of the commencement of his possession." "Written evidence" means no more than "color." Thus, a sheriff's deed under execution was deemed good enough, as to land lying in another than the sheriff's county; a deed from a vendee of land was held evidence of the title to mines, though his vendor had reserved them. A title bond is "written evidence" against all but the vendor. So is a deed made by the ordinary of county lands, though he has no authority to make such deeds. Here, also, an after-acquired title inures to a prior grantee, and is not color against him. A devise which, correctly construed, gives the land to A, is not "written evidence" or color to ripen the possession of B.³⁰² The deed of an insane man, in the hands of an innocent purchaser, is not regarded as either forged or fraudulent. Fraud, to defeat the prescription, must be actual, moral, not legal or constructive. It may, however, be inferred from false recital in the deed, or if the grantor is known to the grantee not to be the owner.³⁰³ The rulings as to "actual possession" under this law have been rather loose, more so than under the 20-years law.³⁰⁴ Evidence that the title has

³⁰¹ Christenbury v. King, 85 N. C. 229 (need not be the last seven years; title vests); Johnson v. Prairie, 94 N. C. 773; Gaylord v. Respass, 92 N. C. 553; Pope v. Matthis, 83 N. C. 169; Parker v. Banks, 79 N. C. 480; Logan v. Fitzgerald, 87 N. C. 308 (advantage of constructive possession).

³⁰² Georgia, Code, § 2681; Beverly v. Burke, 9 Ga. 440; House v. Palmer, 9 Ga. 497; Garrett v. Adrain, 44 Ga. 274; Burdell v. Blain, 66 Ga. 169, and cases cited (title bond); Castleberry v. Black, 58 Ga. 386 (quitclaim). Contra, Parker v. Jones, 57 Ga. 204; White v. Rowland, 67 Ga. 546.

³⁰³ Doe v. Tyson, 49 Ga. 165; Ware v. Barlow, 81 Ga. 1, 6 S. E. 465; Lee v. Ogden, 83 Ga. 325, 10 S. E. 349; Newton v. Mayo, 62 Ga. 11 (purchaser having paid, or become bound to pay, notice does not affect him); Worthy v. Kinamon, 44 Ga. 299 (concealment no reply to him who acquired in good faith). Contra, Farrow v. Bullock, 63 Ga. 360 (time only from innocent acquisition); Payne v. Blackshear, 52 Ga. 637;

³⁰⁴ Joiner v. Borders, 32 Ga. 239; Beverly v. Burke, *supra*; McGee v. (1426)

been out of the state is not demanded from the possessor. The title so gained is good against intruders; also, against the grantor's or former owner's creditors.³⁰⁵

In Texas, there are two short limitations; one enacted first in February, 1841, and intended, like the Kentucky act of 1809, to protect an occupant under a junior state grant against a stale demand under a senior grant, more especially here against grants issuing from the Spanish or Mexican governments, and which fixes a term of three years next after the cause of action shall have accrued. This applies where a person in peaceable and adverse possession has "title" (that is, a regular chain of transfer from the sovereignty of the soil), or "color of title" (that is, a like chain in which one or more of the muniments are not, or not duly, registered, or only in writing, or have some defect not showing want of intrinsic fairness), or where the title is drawn from the sovereign by headright certificate, land warrant, or land scrip only. The other short limitation, drawn from the Illinois act of 1839, allows five years after accrual of action as against a person having like possession of land, "cultivating, using, or enjoying" it, and paying taxes thereon (if any), and claiming under a deed or deeds duly registered; but no deed in the chain must be forged or executed under a forged power of attorney.³⁰⁶ The three-years law is losing in importance as the old conflicts between elder and younger grants are being settled. There is some contrariety in the decisions as to what is "fairness and honesty" in any of the steps. A deed voidable for fraud before the possession began has been held good enough, the possessor himself having bought in good faith; while in another case a deed was held unfair because another deed from the same grantor was already on record. The latest decision is very liberal.³⁰⁷ The tax requirement is the most important, and it is rather narrowly construed. Nonpayment of

Guthry, 32 Ga. 307; Verdery v. Savannah, F. & W. Ry. Co., 82 Ga. 675, 9 S. E. 1133 (possession of receiver is credited to insolvent).

³⁰⁵ Davis v. Stripling, 32 Ga. 656; Buckner v. Chambliss, 30 Ga. 652; Murdock v. Mitchell, Id. 74; Johnston v. Neal, 67 Ga. 528 (execution does not stop running of prescription unless notice of levy given within the seven years).

³⁰⁶ Texas, Rev. St. arts. 3191, 3192; Galan v. Town of Goliad, 32 Tex. 782 (purpose of law).

³⁰⁷ Pearson v. Burditt, 26 Tex. 163. Followed in Grigsby v. May, 84 Tex.

taxes for any one year is fatal; and if the land is listed by a wrong description, which does not identify it, the payment of taxes cannot be credited to the land in dispute.³⁰⁸ A deed seemingly acknowledged by a person with another initial than that of the grantor named therein is not "duly registered." There must be no gap in the possession by registered deed. There is if, during the seven years one possessor sells, and the one after him enters, leaving his deed unrecorded for any length of time. And a deed with no description other than a reference to an unrecorded writing is not deemed a registered deed within the statute. A grantor retaining possession has no color as against his grantees.³⁰⁹

We come next to the short-term limitation laws enacted in favor of purchasers at certain judicial sales; more especially those who have bought land sold by executors, administrators, or guardians under an order or license of a court. These laws are yet, in many cases, so worded as if the action of the owner, whose land has been unlawfully sold, was in the nature of a bill to rescind the sale or deed, independently of the possession taken under it. But they have everywhere been construed as limitations upon the action which may be brought to disturb the purchaser's possession; and the bar is not complete until there has been an adverse possession for the number of years named in the statute.³¹⁰ Attempts have been made to fritter away these laws, made for the purpose of strengthening judicial and fiduciary sales, and thus encouraging bidding, by claiming that a void sale is no sale, and that therefore, the limitation

240, 19 S. W. 343, distinguishing *Eliot v. Whitaker*, 30 Tex. 411, and other cases on that side.

³⁰⁸ *Murphy v. Welder*, 58 Tex. 240; *Dutton v. Thompson*, 85 Tex. 115, 19 S. W. 1026; *Bassett v. Martin*, 83 Tex. 339, 18 S. W. 587 (listing not enough acres of disputed and undisputed land, tax is credited to former).

³⁰⁹ *Carleton v. Lombardi*, 81 Tex. 355, 16 S. W. 1081; *Sorley v. Matlock*, 79 Tex. 304, 15 S. W. 261; *McDonough v. Jefferson Co.*, 79 Tex. 535, 15 S. W. 490; *Bullock v. Smith*, 72 Tex. 545, 10 S. W. 687.

³¹⁰ *Washburn v. Carmichael*, 32 Iowa, 475; *Holmes v. Beal*, 9 Cush. (Mass.) 223; *Vancleave v. Milliken*, 13 Ind. 105; *Knox v. Cleveland*, 13 Wis. 245. In *Morgan v. Hazlehurst Lodge*, 53 Miss. 605, the limitation was not allowed because the land had been vacant within the time of the bar. See, also, note 30 to section 175. However, in Wisconsin the time runs from the time of sale. *Jones v. Lathrop*, 28 Wis. 339. In Michigan and Kansas the short limitation reads in the statute just like the ordinary one.

by its terms does not apply, where the court ordering it had no jurisdiction. These attempts have in Michigan and some other states been steadily met with the simple answer that a valid sale needs no limitation, but have been successful in Iowa in frittering the laws away altogether.³¹¹ We find these short limitations in the following states: In Maine and Massachusetts, five years after an executor's or administrator's sale; in case of a guardian's sale, five years from the termination of the guardianship, with the ordinary savings and exceptions.³¹² Indiana, five years after a sale by an executor, administrator, guardian, or commissioner of court is confirmed; ten years after a sale under execution.³¹³ Florida, five years after possession under a sale by an executor, administrator, or guardian, if the full value has been paid, and the proceeds have been applied in good faith.³¹⁴ Michigan, five years after the right of action accrues against one holding under a sale made by an administrator, executor or guardian, in pursuance of a "judgment, decree, or process of court," or in the course of mortgage foreclosure.³¹⁵ Wisconsin, five years after sale by administrator or executor; five years after termination of guardianship, against purchaser at guardian's sale;

³¹¹ Summers v. Brady, 56 Miss. 10 (where the parties were not notified); Bradley v. Villere, 66 Miss. 399, 6 South. 208 (though the sale is void under constitution); Toll v. Wright, 37 Mich. 93 (misquoted in notes to Annotated Statutes). Cf. note 315. Nor can equity interfere when ejectment barred. Smith v. Davidson, 40 Mich. 632; Smith v. Swenson, 37 Minn. 1, 32 N. W. 784 (sale ordered by court of wrong county). Contra, Pursley v. Hayes, 22 Iowa, 11; Good v. Norley, 28 Iowa, 188 (divided court; Dillon, C. J., in favor of the limitation); Boyles v. Boyles, 37 Iowa, 392; Rankin v. Miller, 43 Iowa, 11.

³¹² Maine, c. 71, § 30; Massachusetts, c. 142, § 21.

³¹³ Indiana, Rev. St. § 293, subds. 3, 4 (part of ordinary limitation law). Applies to execution sale, though land is misdescribed; Second Nat. Bank v. Corey, 94 Ind. 467; void or voidable execution sale, Wright v. Wright, 97 Ind. 149. Wife, as to her share, takes independently of the limitation against the husband. Brenner v. Quick, 88 Ind. 550; Ringle v. First Nat. Bank, 107 Ind. 429, 8 N. E. 236.

³¹⁴ Florida, St. § 1293; Deans v. Wilcoxon, 25 Fla. 980, 7 South. 163.

³¹⁵ Michigan, St. Supp. § 8698, subd. 1. The law protecting sales by license is much older than that passed in 1863 to strengthen sales under judgments. The words "process of court" not being at first contained in the latter, the short term was not applied to an execution which had no judgment to rest on. Miller v. Babcock, 29 Mich. 526.

and the same length of time after removal of disabilities. And it is the same in Minnesota, where this applies also to foreclosure sales under a power.³¹⁶ Mississippi, two years after a sale by order of the chancery court, if the purchase has been made in good faith, and the purchase money has been paid.³¹⁷ Iowa, five years after sale by executor or administrator; five years after a sale by guardian, its validity cannot be questioned (says the statute).³¹⁸ Nebraska, five years after sale by executor, administrator, or by guardian for payment of debts, or after removal of disabilities; when the sale is by the guardian for maintenance, five years after the termination of the guardianship, and five years after the removal of disabilities.³¹⁹ Arkansas, five years after judicial sales; and three years are given after removal of disabilities.³²⁰ Kansas, five years after the deed following an execution sale, or sale by an administrator, executor, or guardian under a judgment is recorded.³²¹ In Montana, Idaho, Nevada, Arizona, and Oklahoma, three years after a sale made by an executor, administrator, or guardian under an order of court, with the same length of time after the removal of disability.³²² In Washington, five years after a sale by executor or administrator; five years after termination of guardianship against the guardian's deed,—with three years in either case after the removal of disabilities.³²³

³¹⁶ Wisconsin, St. § 3918; Minnesota, c. 57, § 50; *Id. c. 81, § 26a.* Where the sale is by an administrator, the bar runs as soon as the purchaser takes possession, and the running is not delayed till the administrator is discharged. *Jones v. Billstein*, 28 Wis. 221. Where the sale by the trustee was wholly void, because it was made when the mortgagee, who must have called for it, was dead, this limitation did not apply. *Bausman v. Kelley*, 38 Minn. 197, 36 N. W. 333.

³¹⁷ Mississippi, § 2760. The person claiming the short-term bar must show good faith in the purchase, *Jeffries v. Dowdle*, 61 Miss. 504; good faith in a remote purchaser is immaterial, same case, and *Richardson v. Brooks*, 52 Miss. 118.

³¹⁸ Iowa, §§ 2265, 2401. The limitation seems to have never been enforced.

³¹⁹ Nebraska, St. §§ 1526, 1776, 1777.

³²⁰ Arkansas, Dig. § 4474. Does not apply to an execution sale. *Hershey v. Latham*, 42 Ark. 305; *Gwynn v. McCauley*, 32 Ark. 97.

³²¹ Kansas, Gen. St. § 4093.

³²² Nevada, § 2859; Idaho, § 5540; Arizona, § 1379; Oklahoma, §§ 1453, 1454.

³²³ Washington, Code Proc. § 114.

All these laws are either expressly so drawn, or are construed as barring only those persons whose estate the sale purports to pass, not one who relies on paramount title, for instance, the widow claiming the homestead right in a house and lot which is sold under license as the property of the heirs.³²⁴ Where the sale is attacked for fraud rather than for irregularity, as it might be as long as the land has not passed to a purchaser in good faith for value, the suit is barred like other suits for relief against fraud; the limitation generally running from the time when the fraud is discovered.³²⁵ Where the short bar is part of the general limitation law, it may be extended by the same savings and exceptions. But where it is inserted among the regulations of the sale, no savings can be applied to it which are not expressly named right then and there.³²⁶

To cut off overnice objections to the form of acknowledging a married woman's deed, or for failure to record it, the Kentucky statute directs that a woman who has during coverture conveyed her lands or leaseholds, while of age, and with her husband's assent, and has acknowledged the deed before the proper officer, shall have only three years after becoming discovert to sue on account of flaws in the acknowledgment or certificate; her heirs or devisees having the like time after her death; and even in case of disability she or they shall have only 10 years.³²⁷

In Massachusetts and Maine, where the minister of a parish may still own as "a corporation sole" his glebe and parsonage, this corporation is given five years after the death, resignation, or removal of the incumbent during whose time a right of action accrues.

³²⁴ Compton v. Pruitt, 88 Ind. 180, and Nutter v. Hawkins, 93 Ind. 264 (widow claiming her share); Showers v. Robinson, 43 Mich. 502, 5 N. W. 988 (widow claiming homestead).

³²⁵ Cowins v. Toole, 31 Iowa, 513; Phelps v. Jackson, 31 Ark. 272.

³²⁶ See last note to section 177; also White v. Clawson, 79 Ind. 192 (ordinary time after removal); Michigan, 2 How. Ann. St. § 8698.

³²⁷ Kentucky, St. §§ 2510-2512. Enforced in Bankston v. Crabtree Coal Min. Co. (Ky.) 25 S. W. 1105. Quære: Why would not the short limitation apply to attacks for fraud as well as to those for flaws? And would a "separate estate" sold against the requirements of the local law be barred by the short term? The act applies only to an action for the wife's own land, not to a suit for dower.

The object is, of course, to guard against unlawful alienation by the incumbent, or his connivance with spoliation.³²⁸

Occasionally yet the two-years limitation, which the national bankrupt law of 1866 finally repealed in 1878, granted in favor of the assignee in bankruptcy and those deriving title from him, against all adverse claims, and in favor of all persons claiming adversely to him, comes to the front. The supreme court has impressed upon it an exception that where fraud was concealed the assignee is only barred in two years from the discovery thereof; but a discovery as late as our own days would hardly be considered. Where the assignee remained the owner of the thing in dispute to the end of the two years, the demand, whether for money or for land, is gone, and cannot be revived by his abandoning it thereafter to the bankrupt;³²⁹ but where the assignee parted with the land or other thing in dispute before the end of the two years it seems that the limitation, which was enacted to quicken the winding up of the bankrupt's estate, does not apply as between the grantee of the assignee and third parties.³³⁰

§ 187. Limitation for and against the Tax Title.

In Illinois, North Carolina, Georgia, Colorado, and Texas the tax deed is only, as we have seen, one of the instruments which gives "color" or is written evidence of title, and thus entitles its holder to a short limitation. We must, however, add that in Texas such a deed, if it fails to describe the land with certainty (for instance, when it purports to convey a number of acres out of a larger tract), or describes land other than that in dispute, is not "title or color of title" either under the five-years or under the three-years law.³³¹

³²⁸ Massachusetts, Pub. St. c. 196, § 4; Maine, c. 105, § 6. Perhaps this law should have been classed among the "exceptions."

³²⁹ Rev. St. U. S. § 5057; *Rock v. Dennett*, 155 Mass. 500, 30 N. E. 171 (not repealed by repeal of bankrupt law); *Bailey v. Glover*, 21 Wall. 342 (counts from discovery of fraud); *Jenkins v. International Bank*, 106 U. S. 571, 2 Sup. Ct. 1 (bars debts, hence mortgages and liens); *Gifford v. Helms*, 98 U. S. 248 (assignee once barred, grantee is); *Kenyon v. Wrisley*, 147 Mass. 476, 18 N. E. 227 (though grantee is the bankrupt).

³³⁰ *Moorman v. Arthur*, 90 Va. 455, 18 S. E. 869.

³³¹ *Kilpatrick v. Sisneros*, 23 Tex. 113; *Wofford v. M Kinna*, Id. 36, approved in *Schleicher v. Gatlin*, 85 Tex. 270, 20 S. W. 120.

Indiana has no special bar for tax titles, unless they are comprised in the ten-year law for judicial sales; the sale of land for taxes in that state being made by the sheriff under the order of the circuit court. The limitation seems not to be favored.³³² New York has shortened the limitation from 20 to 15 years only after the sale of unoccupied and unimproved lands of nonresidents, which are deemed regular at the expiration of that period from the sale, and all savings for disability are denied. It is left in doubt whether the act would cure so-called "jurisdictional" defects, and it has so far been enforced only in case of very slight irregularities in the tax proceeding.³³³ Those states which have given to the buyer at a tax sale a short limitation have either in the statute itself fixed the delivery or the recording of the official deed as the date from which the time runs, or the statute, counting in terms from the sale, has been construed as if it counted from the deed, because the sale always gives a certain time of redemption, which must expire before the purchaser at a valid sale becomes the owner. A third course is taken by the Mississippi statute, which makes the three years of occupation begin two years at least after the sale.

Other states have legislated in favor of tax deeds in like manner as for deeds under licensed or judicial sales. Thus there is a term of 10 years in Michigan, on the same footing as to savings and exceptions as the common bar of 15 years. No length of time validates the tax deed, unless and as far as it is accompanied by possession.³³⁴ In Minnesota three years after a sale by the auditor the owner's suit is barred; but a decision of the supreme court that a sale under judgment is binding though the tax had been paid, called forth an amendment to the law in 1887, by which it is directed that a sale under such circumstances shall not only be void, but shall not be

³³² Indiana, Rev. St. § 293, subd. 3. Compare section 6492. See *Bowen v. Swander*, 121 Ind. 164, 22 N. E. 725.

³³³ Laws 1882, c. 287; *Ensign v. Barse*, 107 N. Y. 329, 14 N. E. 400, and 15 N. E. 401.

³³⁴ Michigan, § 8698, subd. 2; *Harrison v. Spencer*, 90 Mich. 586, 51 N. W. 642 (a deed 24 years old is set aside). In fact the buyer's delay in taking possession is a badge of weakness. The bar is good, though the tax was assessed against the wrong person, or though the deed be void on its face. *Chamberlain v. Ahrens*, 55 Mich. 111, 20 N. W. 814; *Reilly v. Blaser*, 61 Mich. 399, 28 N. W. 151.

cured by the short limitation.³³⁵ Wisconsin has shortened her limitation on tax deeds to three years from the recording of the deed for an ejectment, or for a suit to cancel the deed, with one year to minors after coming of age, and with the proviso that, if the tax had been paid before sale, or the land had been redeemed after sale within due time, or when the land was not liable to taxation, the short bar should not apply. In 1878 a new act was passed, allowing only nine months within which to sue for land sold for taxes theretofore levied, counting from the recording of the deed, and the same term for a suit to set aside any sale, certificate, or deed, counting from the sale, grant of certificate, or recording of tax deed. In making the deed conclusive after the lapse of three years, an exception is made in favor of minors.³³⁶ Everything "from the assessment to the deed" is then deemed to have been rightly done,—that is, everything which the revenue laws demand,—though it appear that the sale was for an excess. As the owner may sue to cancel the deed, he is barred of all remedy in that time when the land is vacant. When the taxing officers had no jurisdiction,—e. g. when the town for which they act had not been legally laid out, or when the tax has before sale been paid on part of the lot,—the statute does not apply. But it does, though the deed be void on its face (for instance, for not running in the name of the state),³³⁷ provided the purchaser takes possession within the three years from its date. The possession of the owner prevents the statute from running in favor of the tax claimant; otherwise a deed fair on its face would draw the possession of vacant land to itself. But this possession by the owner need not be as constant or visible as that which an intruder must keep up to gain a prescription.³³⁸ A fur-

³³⁵ Minnesota, c. 11, § 85, as amended in supplement from act of 1887. *Baker v. Kelley*, 11 Minn. 480 (Gil. 358); *Hill v. Lund*, 13 Minn. 451 (Gil. 419); *Sheehy v. Hinds*, 27 Minn. 262, 6 N. W. 781.

³³⁶ Wisconsin, St. §§ 1188, 1189, 1210d-1210f. The latter sections refer only to sales made for taxes levied before 1878, and are probably obsolete.

³³⁷ *Prentice v. Ashland Co.*, 56 Wis. 345, 14 N. W. 297; *Geekie v. Kirby Carpenter Co.*, 106 U. S. 379, 1 Sup. Ct. 315; *Milledge v. Coleman*, 47 Wis. 184, 2 N. W. 77; *Smith v. Sherry*, 54 Wis. 114, 11 N. W. 465; *Knox v. Cleveland*, 13 Wis. 245. (This statute bars not only the remedy, but transfers the right.) *Whitney v. Marshall*, 17 Wis. 174. *Coleman v. Peshtigo Lumber Co.*, 30 Fed. 317, points out the differences between the present and older statutes.

³³⁸ *Morris v. Carmichael*, 68 Wis. 133, 31 N. W. 483; *Ramsey v. Hommel*,

ther act of March 28, 1885, affecting only tax deeds made before its date, allows the owner or those claiming under him, under certain circumstances, only nine months from the date of the act in which to sue. It is therefore obsolete.³³⁹ The Pennsylvania law gives to the owner five years from the time of the delivery of the tax deed to the purchaser, without regard to the possession of the land, as an act of 1824 authorizes him to bring ejectment against the purchaser, and thus test the tax deed, though he remains in possession.³⁴⁰

In Iowa, the owner has five years from the recording of the tax deed, though the statute says from the sale, which is not considered complete till the time to redeem has run out, and a deed is put upon record. If there has been no sale in fact, though one is recited in the deed, this limitation does not apply; and so it is where the sale was void for the want of the levy or assessment of the tax. Much difficulty seems to have arisen on deeds which do not recite in proper manner the affidavit of notice to the owner that the time of redemption has expired. An omission in that regard, or in the man-

68 Wis. 12, 31 N. W. 271; Hiles v. La Flesh, 59 Wis. 465, 18 N. W. 435; Lain v. Shepardson, 18 Wis. 59; Cutler v. Hurlbut, 29 Wis. 152 (not when deed void on its face). See, also, Larson v. Aultman & Taylor Co., 86 Wis. 281, 56 N. W. 915; Gould v. Sullivan, 84 Wis. 659, 34 N. W. 1013.

³³⁹ Wisconsin, § 1189a. See Webster v. Schwears, 69 Wis. 89, 33 N. W. 105. The Annotated Statutes of Wisconsin, published in 1889, contain no less than four large pages, double column, in small print, of the notes of cases to sections 1187 and 1188, which give the short limitation for and against the tax deed. Towards 1885 the state authorities succeeded at last in carrying through valid tax sales, and the cases in which a limitation has to be invoked have ever since become comparatively rare. A tax deed void on its face, being good color of title (McMillan v. Wehle, 55 Wis. 686, 13 N. W. 694), thus brings in the 10-year limitation, provided the possession is actual (Whittlesey v. Hoppenyan, 72 Wis. 140, 39 N. W. 355); hence the old defective tax titles must soon be cleared up. See, also, the notes to the temporary acts giving a nine-months limitation to cure certain irregularities (sections 1210d-1210f).

³⁴⁰ The history of the rule appears from Waln v. Shearman, S Serg. & R. 357; Bigler v. Karns, 4 Watts & S. 137; Shearer v. Woodburn, 10 Pa. St. 511; Robb v. Bowen, 9 Pa. St. 71; Stewart v. Trevor, 56 Pa. St. 374 ("since the act of 1824, the limitation is perfect at the end of five years from the delivery of the deed, without regard to possession"); Johnston v. Jackson, 70 Pa. St. 164. In Brown v. Hays, 66 Pa. St. 229, 236, Agnew, J., speaks with indignation of the tax buyer's constructive possession.

ner of the assessment, is just what limitation is intended to cure. Nor is the sale of several adjoining lots for a sum in gross a void sale, in the sense of "not a sale."³⁴¹ Here, as in Wisconsin, the tax purchaser is deemed to have constructive possession of wild lands, unless it is, before the expiration of the statutory time, interrupted by the owner himself entering: provided, that his deed is not void upon its face.³⁴² In Missouri, a former act gave the holder of the tax deed the benefit of a three-years' limitation, and, under an act of 1872, any person putting a tax deed upon record is deemed to set up a title, and any one claiming to be the owner can bring an action against him or those claiming under him. The short limitation has been dropped from the Revisions of 1879 and 1889, but the last-named provision has been retained, and its effect is to ripen defective tax deeds for vacant lands into good titles in 10 years, if not in 3. There can be no constructive possession where either the owner or any one else is in actual possession. The short limitation did not apply, nor does the tax claimant's right to count the bar from the registration of his deed, without taking possession, when that deed was void upon its face. The short limitation was not allowed if the land was exempt, or when the tax had been paid, either before the sale, or, by way of redemption, after it. Whether such facts would prevent the running of the ordinary limitation or not is not clear.³⁴³

In Nebraska, the owner has three years after the execution of the deed to the purchaser, with a like period after the removal of dis-

³⁴¹ Iowa, § 902 (former section 790, as referred to in older cases); Bolin v. Francis, 72 Iowa, 619, 34 N. W. 447; Trulock v. Bentley, 67 Iowa, 602, 25 N. W. 824; Griffin v. Bruce, 73 Iowa, 126, 34 N. W. 773; Monk v. Corbin, 58 Iowa, 503, 12 N. W. 571. Cases of void sale: Early v. Whittingham, 43 Iowa, 167; Case v. Albee, 28 Iowa, 277; Nichols v. McGlathery, 43 Iowa, 189; Burdick v. Bingham, 38 Minn. 482, 38 N. W. 489.

³⁴² Moingona Coal Co. v. Blair, 51 Iowa, 447, 1 N. W. 768; Barrett v. Love, 48 Iowa, 103; Bullis v. Marsh, 56 Iowa, 747, 2 N. W. 578, and 6 N. W. 177.

³⁴³ Missouri, 2 Wag. St. p. 1207; Rev. St. 1889, § 7698; De Graw v. Tayler, 37 Mo. 310; Pease v. Lawson, 33 Mo. 35 (from date of deed); Hill v. Atterbury, 88 Mo. 120 (tax paid, or etc., no short bar); Mason v. Crowder, 85 Mo. 532; Callahan v. Davis, 90 Mo. 78, 2 S. W. 216; Duff v. Neilson, 90 Mo. 93, 2 S. W. 222 (blank for date unfilled when deed put to record, void "on its face").

bility. The deed must not be void on its face, and must be properly authenticated. The limitation is only in aid of an adverse possession, just like the ordinary bar in ejectment.³⁴⁴ In Kansas, the owner has only two years from the recording of the tax deed; but, if it is void on its face, the short limitation does not avail. But, under this clause of the limitation law, possession seems not to be material, except as it becomes so by the reciprocal limitation, to be mentioned hereafter.³⁴⁵ In the Dakotas the limitation for suit is three years from the recording of the deed, and, as those who labor under disabilities have one year after the removal thereof in which to redeem from the sale, there is no need for a saving for disability.³⁴⁶ In Florida, it is now four years after the sale, three years after the removal of disabilities; the time to count from the recording of the deed. The statute, however, seems to confine the curing virtue of this time only to named defects.³⁴⁷ In Mississippi, there must be a three-years occupation (a word which excludes anything like constructive possession), beginning at least two years after the sale; i. e. five years must elapse from the sale, or five years from the removal of disabilities. The time named cures "defects in the sale or in any preceding step," but not a sale where the tax had been paid. It does, however, where the land was exempt from tax. The law does apply to the sale of "tax lands" previously struck down to the state, but not to deeds made by circuit court clerks, under a law of 1872. It cannot be invoked against a subsequent tax buyer.³⁴⁸ It is two years in Arkansas ("no action, unless the plaintiff

³⁴⁴ Nebraska, St. § 4033; Sutton v. Stone, 4 Neb. 322; Baldwin v. Merriam, 16 Neb. 199, 20 N. W. 250; Bendexen v. Fenton, 21 Neb. 185, 31 N. W. 685 (not sealed, hence void on its face); Towle v. Holt, 14 Neb. 228, 15 N. W. 203 (did not show sale at courthouse door); Housel v. Boggs, 17 Neb. 94, 22 N. W. 226. The void tax deed is color of title under the general law. Lantry v. Parker, 37 Neb. 353, 55 N. W. 962.

³⁴⁵ Kansas, § 4093, subd. 3. A tax claimant, absent from the state, cannot, as plaintiff suing for wild land, claim the benefit of the limitation. Case v. Frazier, 31 Kan. 689, 3 Pac. 497; Neenan v. White, 50 Kan. 639, 32 Pac. 381 (though doubtful whether the deed was made to the lawful holder of the tax certificate). In Waterson v. Devoe, 18 Kan. 223, it is said that possession or color and claim of title does not enter into this limitation against the tax deed.

³⁴⁶ Dakota Territory, Pol. Code, § 75.

³⁴⁷ Florida, § 400; Mundee v. Freeman, 23 Fla. 529, 3 South. 153.

³⁴⁸ Mississippi, § 2735. Contra, act for redemption deeds (section 1709 of

or" etc., "was seized within two years"). The deed to the buyer, under some of the revenue laws, is known as a "donation deed"; the state first becoming the owner, and then disposing of the land as its own. As against these, at least, the two-years' limitation has no saving for infancy. Whether such a limitation runs against a remainder-man is left undecided; but probably not, as the bar is held to run only in favor of an adverse possession.³⁴⁹ In Colorado, there is a five-years limitation, nominally from the sale, but really from its completion by deed, after the time to redeem has run out, with one year after the removal of disability from minors, idiots, or the insane. But the tax claimant must be in possession, to have the benefit of the bar of time; for only a suit "for the recovery of land" is limited. While the owner is in possession he may, if the tax deed is void, sue to quiet the title; and the supreme court does not admit that the buyer at the tax sale can "draw the possession" of vacant land to his deed, when that deed does not by its own force carry a good title.³⁵⁰ In Oregon, no action can be brought to recover land sold for taxes, when more than three years have run from the recording of the deed, except when the tax was paid, or never due, or the land has been redeemed. The clause giving this limitation, being a part of the revenue law, is not applied to sale of land for street assessments.³⁵¹ In West Virginia, it seems that a tax deed cannot be assailed at all, unless the taxes were not in arrear

Code 1871, or section 539 of Code 1880). *Carlisle v. Yoder*, 69 Miss. 384, 12 South. 255 (under former law, *quaere*, if now short bar runs, though land exempt); *Pearce v. Perkins*, 70 Miss. 276, 12 South. 205; *Metcalfe v. Perry*, 66 Miss. 68, 5 South. 232 (tax paid); *Patterson v. Durfey*, 68 Miss. 779, 9 South. 354 (exempt); *Pipes v. Farrar*, 64 Miss. 514, 1 South. 740 (tax lands); *Lewis v. Scibbles*, 65 Miss. 251, 3 South. 652 (against new tax sale).

³⁴⁹ Arkansas, § 4489; *Sims v. Cumby*, 53 Ark. 418, 14 S. W. 623 (no saving against "donation deed"; section 4489 does not apply. *Quaere*, whether remainders are barred); *Cairo & Fulton R. Co. v. Parks*, 32 Ark. 131; *Mitchell v. Etter*, 22 Ark. 178; *Buckingham v. Hallett*, 24 Ark. 519; *Wright v. Walker*, 30 Ark. 44; *Gates v. Kelsey*, 57 Ark. 523, 22 S. W. 162 (adverse possession).

³⁵⁰ Colorado, Compilation of 1883, § 2934, amended in 1885 (see Mills' Ed. St. § 3904) but in the main unchanged; *Morris v. St. Louis Nat. Bank*, 17 Colo. 231, 29 Pac. 802 (relies on *Eldridge v. Kuehl*, 27 Iowa, 160, and on *Shatlemiller v. McCarty*, 55 Pa. St. 188). This is remarkable, as in Colorado an ejectment may be brought for vacant land, as since 1824 in Pennsylvania.

³⁵¹ Oregon, § 2840; *Meier v. Kelly*, 20 Or. 86, 25 Pac. 73.

when it was made, and, even in that case, only within five years; and, as the remedy of the owner is a suit in equity to cancel the deed, the time would expire, though his possession was not disturbed. The courts have however been unwilling to enforce the limitation where the tax had been paid in time, and the owner was wholly without fault.³⁵² In Wyoming, the sale may be avoided by suit within six years after its date; in Oklahoma, in one year after the recording of the tax deed, without any saving whatever.³⁵³ In Alabama, the short limitation of former codes in favor of the tax deed has been omitted from that of 1886, but instructive cases decided under the old law may be of interest elsewhere.³⁵⁴ There is no short time bar in favor of a bad tax deed in Massachusetts; a statute to which it was sought to give such an effect limits the redemption from a valid sale.³⁵⁵

The short limitation is given to the holder of a defective tax title to encourage bidding at the tax sales; and the only purpose is to convert a bad tax title into a good one. The laws providing the short bar have nothing to do with the improper acquisition of a tax title, good enough under the revenue and procedure laws, by one whose duty it is, as that of a mortgagor to the mortgagee, a cotenant to his companions, etc., to protect the land against a sale for taxes. One who thus obtains the tax deed becomes thereby a trustee of the estate so gained; and the time when, or circumstances under which, the trust is barred, is wholly independent of the statutes above referred to.³⁵⁶ There is as much reason for a short limitation against the purchaser at the tax sale, who always buys the land for a small fraction of its value, as for that against

³⁵² West Virginia, c. 31, § 27; *Bradley v. Ewart*, 18 W. Va. 598 (approved in and strengthened by *Campbell v. Wyant*, 26 W. Va. 702).

³⁵³ Wyoming, § 3835; Oklahoma, § 6224. There has been no time yet for reported decisions.

³⁵⁴ *Doe v. Clayton*, 81 Ala. 391, 2 South. 23 (under Code 1876, § 464). See, also, *Austin v. Willis*, 90 Ala. 421, 8 South. 94; *Pugh v. Youngblood*, 69 Ala. 298.

³⁵⁵ *Smith v. Smith*, 150 Mass. 73, 22 N. E. 437.

³⁵⁶ *McGee v. Holmes*, 63 Miss. 50; *Nickum v. Gaston*, 24 Or. 380, 33 Pac. 671, and 35 Pac. 31 (sale suffered to defraud lien holders); *McMahon v. McGraw*, 26 Wis. 614 (deed taken by agent). Quære as to collusion of officer, *Hazeltine v. Simpson*, 58 Wis. 579, 17 N. W. 332.

the former owner. The law in Wisconsin has been said to be two-edged; that is, the same length of time bars either party where the land is in the actual possession of his adversary. But when the possession is vacant (and so it generally is where land is allowed to go unredeemed after a tax sale), a deed valid upon its face gives to the tax claimant a constructive possession. One which is void upon its face does not.³⁵⁷ In Iowa, the purchaser must also take or sue for possession within five years from the time when his deed is recorded, or when he was entitled to have his deed, and could have put it on record. After the lapse of five years, he has no standing in a court of equity to redeem the land from a mortgage foreclosure. But if the land is vacant, the purchaser is not barred as against the owner.³⁵⁸ In Kansas, the tax claimant is given only two years, after he has his deed recorded, wherein to sue for possession. He has the constructive possession of vacant land, for this as for the opposite purpose, unless the deed is void on its face or for jurisdictional defects. Where a purchaser for taxes himself falls in arrears, and the land is again sold for taxes, the first buyer is barred only by five years from setting up defects in the second sale.³⁵⁹ In Nebraska, while the holder of a tax deed is not barred by any shorter limitation than others seeking to recover land, one who holds a mere certificate of purchase for taxes is barred, unless he obtains a deed within five years, or brings suit upon his certificate, and loses, also, his lien and the right to recover back what he has paid.³⁶⁰

³⁵⁷ The Wisconsin statute has been likened to a two-edged sword. *Falkner v. Dorman*, 7 Wis. 388; *Knox v. Cleveland*, 13 Wis. 245; *Swain v. Comstock*, 18 Wis. 463 (law applies to city taxes).

³⁵⁸ *Hintrager v. Hennessy*, 46 Iowa, 600; *Laverty v. Sexton*, 41 Iowa, 435; *Peck v. Sexton*, 41 Iowa, 566; *Brown v. Painter*, 38 Iowa, 456.

³⁵⁹ *Thornburgh v. Cole*, 27 Kan. 490; *Cheesebrough v. Parker*, 25 Kan. 566; *Harris v. Curran*, 32 Kan. 580, 4 Pac. 1044.

³⁶⁰ *Alexander v. Shaffer* (Neb.) 57 N. W. 541. The bar runs from the day when redemption expires, *Parker v. Matheson*, 21 Neb. 546, 32 N. W. 598; when a deed has been taken, from the time it fails, *McClure v. Lavender*, Id. 181, 31 N. W. 672.

§ 188. Limitation and Laches in Equity.

There is much uncertainty as to the lapse of time which will bar suits in equity (in form or substance) affecting land, and much diversity of opinion. Some states, which, like New York, profess to have abolished the distinction between "law" and "equity" in procedure, apply shorter bars where the remedy under the old system would have been equitable; and what is known as "laches," or "staleness of demand," is a bar of time, not reducible to any rules.³⁶¹

Where the owner who seeks to recover his land has a "perfect" equity, which differs only in form from the fee at law, courts of equity act upon the maxim (unless bidden otherwise by the express words of the statute) that "equity follows the law," and obey the statute governing an ejectment or writ of entry, with all its savings and exceptions. A cestui que trust under a naked trust; the grantee in a deed which, for lack of seal or attestation, does not, under the local law, pass the legal title; a purchaser at a chancery sale, to whom no deed has been made; the obligee in a title bond, who has paid all of the purchase money,—have such perfect equity.³⁶² Still stronger is the reason for "following the law" where the remedy is concurrent; for instance, in an equity suit for partition or dower.³⁶³ In Missouri

³⁶¹ Laches and limitation are treated in Story, Eq. Jur. §§ 64a, 529, 771, 773–781; also, §§ 1028, 1520–1522; Pom. Eq. Jur. §§ 70, 418, 419, 610–613, 716, 727, 731, 732, 750, 817, 897, 917, 965, 1080, 1408. Only the smaller part of the matter here comprised touches land titles. The subject of laches, even when it touches land, is not generally treated in books on real estate, and cannot be fully gone into herein. We have seen that the question of "laches" may be raised by demurrer to the bill. If there is an excuse for it, such as infancy, unsound mind, etc., it should be set forth in the bill. *Badger v. Badger*, 2 Wall. 94.

³⁶² *Ray v. Sweeney*, 14 Bush, 1. In several states the same bar is expressly prescribed for suits in equity touching the same subject-matter, as for suits at law—in Illinois, c. 83, § 22; Mississippi, § 2731; Alabama, § 3419. See, also, section 175, note 18, and for contrary rule in New York and Wisconsin.

³⁶³ *Dunne v. Stotesbury*, 16 Colo. 89, 26 Pac. 333; *Farnam v. Brocks*, 9 Pick. 212; *Smith v. Wood*, 42 N. J. Eq. 563, 7 Atl. 881; affirmed, 44 N. J. Eq. 603, 17 Atl. 1104 (suit to set aside fraudulent conveyance). In *Russell's Heirs v. Marks' Heirs*, 3 Metc. (Ky.) 37, where a grantee from the state was misnamed, his heirs fared better by insisting on the ordinary bar in ejectment, which

there is a tendency to treat every suit by which equity can restore the land to its rightful owner, by removing obstacles out of his way, as a suit for the recovery of land.³⁶⁴ But where the complainant's equity is not complete, where he comes into court to have obstructions removed, to have a deed rescinded, or to have a conveyance set aside as a fraud upon him as a creditor; to get rid of a foreclosure sale under a void judgment, where he cannot sue at law; or to enforce a right arising under an executory contract or trust, lost through oversight or mistake,—in all these cases a court of equity will either apply another and generally shorter limitation for "actions not otherwise provided for," or its own theory of laches, by which "stale demands" are thrown out. And the measure for vigilance or laches is very vague,—only loosely related to the statutory bar in the several states; nearly always much shorter.³⁶⁵

counted only from their adversary's entry. *Church v. Ruland*, 64 Pa. St. 432 (time runs only from the date of the wrong and injury); *Cartwright v. McGown*, 121 Ill. 388, 12 N. E. 737 (running back to *Kane v. Bloodgood*, 7 Johns. Ch. 90).

³⁶⁴ *Dunn v. Miller*, 96 Mo. 324, 9 S. W. 640; *Connecticut Mut. Life Ins. Co. v. Smith*, 118 Mo. 261, 22 S. W. 623; *Burdett v. May*, 100 Mo. 13, 12 S. W. 1056 (counting the limitation from the discovery of the facts).

³⁶⁵ *Peebles v. Reading*, 8 Serg. & R. 493 (a leading American case on laches); *Great West Min. Co. v. Woodmas of Alston Min. Co.*, 14 Colo. 90, 23 Pac. 908 (equity may grant less time, but never more); *Martin v. Gray*, 142 U. S. 236, 12 Sup. Ct. 186 (11 years); *Connely v. Rue*, 148 Ill. 207, 35 N. E. 824 (3 years); *Eberstein v. Willets*, 134 Ill. 101, 24 N. E. 967 (3 years to set aside deed for duress). See, also: *Williams v. Rhodes*, S1 Ill. 571 ("numerous cases where a delay for a much less period, etc., has been held to preclude, etc."). This is so especially where a court of equity is called on to set aside a judicial or quasi judicial sale, after the land has gone up considerably in price. *Bangs v. Stephenson*, 63 Mich. 661, 30 N. W. 317 (equity on part paid land certificate, 11 years' adverse possession, stale); *Mathews v. Culbertson*, 83 Iowa, 434, 50 N. W. 201; *Gregory v. Rhoden*, 24 S. C. 90, 99, quoting four earlier cases in same state (equitable remedy may be barred long before legal). Georgia, Code, § 2924, declares that limitation avails in equity or at law, and, in addition, courts of equity may apply a shorter bar in accordance with their old doctrine of laches. But laches for a shorter time than limitation can never be pleaded to an action at law, though the enforcement after delay seems inequitable. *Waterman v. A. & W. Sprague Manuf'g Co.*, 55 Conn. 554, 12 Atl. 240; *Barton v. Long*, 45 N. J. Eq. 841, 14 Atl. 566-568. The leading English case is *Smith v. Clay*, 3 Brown, Ch. 638, note; 2 Amb. 645. See, also, *Attwood v. Small*, 6 Clark & F. 356.

Only when a "continuing trust" is shown, a court of equity allows a longer delay than a court of law; that is, where one is appointed or undertakes to hold and manage an estate for the benefit of others, the chancellor assumes that he still holds or manages the land or fund for such a purpose, though he has in fact, for a long time, taken the rents and profits to his own use. This is, in fact, only one of those cases of possession, not adverse, but "friendly," which, we have seen, are also recognized by courts at law.

In many states the exemption of "express and continuing trusts" from the bar of limitation is expressly set down in the statute;³⁶⁶ in others it is worked out upon English precedents.³⁶⁷ It is, however, often attempted to set up very old, stale equities to land, simply because one who acted, or, from his relation to another, ought to have acted, as his trustee, had gotten the title to land in his own name, though he had long since thrown off the mask, and though, through death or alienation, the property has passed into other hands. Such attempts have generally failed.³⁶⁸ In California and

³⁶⁶ E. g. Kentucky, St. 1894, § 2533; enforced in *McQuerry v. Gilliland*, 89 Ky. 434, 12 S. W. 1037, in 1884, against devisees of one who had in 1852 located his son's land warrant in his own name.

³⁶⁷ *Fawcett v. Fawcett*, 85 Wis. 332, 55 N. W. 405 (husband buying in own name with wife's fund, no limitation against trust during joint lives); *Attorney General v. City of Newark*, 6 N. J. Eq. 201 (trust for cemetery); *Philippi v. Philippe*, 115 U. S. 156, 5 Sup. Ct. 1181 (trust must be renounced, and notice brought home to cestui que trust); *Wren v. Followell*, 52 Ark. 76, 12 S. W. 155 (attorney bidding in land on client's decree); *Beadle v. Seat* (Ala.) 15 South. 243 (statute runs not while trust relation lasts). S. p., *Nettles v. Nettles*, 67 Ala. 599; *Woodard v. Jaggers*, 48 Ark. 248, 2 S. W. 851; *Dean v. Dean*, 9 N. J. Eq. 425. See *Cholmondeley v. Clinton*, 2 Mer. 360 (before the master of the rolls). In *Decouche v. Savetier*, 3 Johns. Ch. 190, and *Manaudas v. Mann*, 22 Or. 525, 30 Pac. 422, the extreme ground is taken that the trustee cannot hold adversely before he has restored the possession to the beneficiary.

³⁶⁸ *Clarke v. Boorman*, 18 Wall. 493; *Ashhurst's Appeal*, 60 Pa. St. 290, 316; *McGaughey v. Brown*, 46 Ark. 25 (bid at administrator's sale transferred to the seller's wife does not make a continuing trust); *Marsh v. Whitmore*, 21 Wall. 178 (reasons for delay to be given). It is said in *Cholmondeley v. Clinton*, 2 Jac. & W. 1, and in *Elmendorf v. Taylor*, 10 Wheat. 174, that equity never acts by analogy to the limitation of the writ of right, but always of the ejectment, and that, in the absence of disabilities, a trust is barred in 20 years from breach or disavowal. These cases are quoted in *Sullivan v.*

Colorado the favor shown to express trusts is also extended to those trusts that result to the party paying the purchase money for land, the title to which is taken in the name of another,—a species of trusts which has been abolished in most other states, but is here kept in force. But to other “implied” trusts the limitation of four years is applied.³⁶⁹ It may be thus in other states in which the limitation for ejectments is equally short; but, generally speaking, the distinction between “express, continuing trusts,” and those “resulting” from the payment of the price, or from the treacherous obtention of the legal title, is kept in view.³⁷⁰ And, though an attorney or guardian thus obtaining the title to land in fraud of his client or ward might be deemed to hold it under an express and continuing trust, one to whom he conveys it, though with notice of the fraud, or without consideration, and who takes the land subject to the trust, could not be charged as the trustee of an express trust, and limitation would run in his favor.³⁷¹ Otherwise, also, it has become necessary for courts of equity to call a halt upon the attempt to widen the field of those trusts which defy the hand of time—First, by taking hold

Latimer, 35 S. C. 422, 14 S. E. 933; but a continuing trust was fastened on one who bought from the executor of a former trustee, so as to restore the trust land to a cestui que trust for life, after more than 20 years from the sale. The decision was influenced somewhat by the consideration that after her death the remainder-men must, at any rate, recover. *Boyd v. Clements*, 14 Ga. 639 (right of cestui que trust to set aside trustee's dealings with himself may be barred by long acquiescence). Trust arising ex maleficio (malfeasance) is barred by limitation. *Barnes v. Taylor*, 27 N. J. Eq. 259.

³⁶⁹ *Millard v. Hathaway*, 27 Cal. 119 (the limitation was reckoned only from the time when the plaintiff had fully reimbursed the defendant); *De Mares v. Gilpin*, 15 Colo. 76, 24 Pac. 568 (but not applied in that case). *Contra*, *Chapman v. Bank of California*, 97 Cal. 155, 31 Pac. 896. Agent buying land with principal's fund, no limitation runs till trust renounced. *Warren v. Adams*, 19 Colo. 515, 36 Pac. 604.

³⁷⁰ *Cooper v. Lee*, 75 Tex. 114, 12 S. W. 483. In fact, the payment of the consideration by a third person was held to raise an express trust, in *Brotherton v. Weathersby*, 73 Tex. 471, 11 S. W. 505, and *Simpson v. Brotherton*, 62 Tex. 170, which defies the bar of limitation. In Pennsylvania, by statute, five years, without saving or exception.

³⁷¹ *Barrett v. Bamber*, 81 Pa. St. 247. But the trust is repudiated only as to the land sold, not as to that retained. *Goode v. Lowery*, 70 Tex. 150, 8 S. W. 73; also cases in note 368.

of acts by which the trusteeship is clearly renounced, and the rights of the beneficiary owner denied; ³⁷² secondly, by refusing relief when a term much longer than that of the limitation at law has elapsed,—acting upon the flexible doctrine of laches rather than the rigid standard of a statute.³⁷³

But it is never laches to wait, before attacking a fraudulent deed or will, judgment, or decree, until the same is set up against the true and equitable owner. This is a principle closely akin to, but not exactly the same as, that other which imputes no laches to the party in possession.³⁷⁴ There are many statutory limitations which govern those suits which either still are, or under the old practice were, suits in equity. Thus, as already indicated, the statutes of Wisconsin, while allowing 20 years for a suit for land based on the title at law, restrict a suit based on such grounds as would before the practice act of 1857 have been cognizable in equity only to a term of 10 years; while in New York it has been held that an action setting up an equitable interest in land is not an action for its recovery, but falls under the head of unnamed actions, with a limitation of 10 years.³⁷⁵ Again, where a deed under which possession is held can only be attacked and annulled for fraud or mistake, the special limitation which the laws of many states prescribe as to actions for relief against fraud or mistake must be regarded. The length of the bar is generally much shorter than in ejectment, and there is perhaps no saving for disabilities; while, on the other hand,

³⁷² Seculovich v. Morton, 101 Cal. 673, 36 Pac. 387 (resulting trust barred in 23 years, though the defendant was absent from the state); Anderson v. Northrop, 30 Fla. 612, 12 South. 318.

³⁷³ Taylor v. Whitney, 56 Minn. 386, 57 N. W. 937 (33 years, unexplained); Felix v. Patrick, 145 U. S. 317, 12 Sup. Ct. 862 (trust ex maleficio; 40 years, and an enormous increase in value; not conceded that one locating a land warrant fraudulently obtained is under a continuing trust for the land); Bates v. Gillett, 132 Ill. 287, 24 N. E. 611; Duncan v. Williams, 89 Ala. 341, 7 South. 416; Taylor v. Blair, 14 Mo. 441.

³⁷⁴ Thus a party in possession may at any time bring suit to have a mortgage gotten from him or his ancestor by duress set aside. Schoener v. Lissauer, 107 N. Y. 111, 13 N. E. 741.

³⁷⁵ New York, Code Civ. Proc. § 388 (actions not otherwise prescribed, 10 years; includes all equitable suits for land); Hubbell v. Sibley, 50 N. Y. 468; Wisconsin, St. § 4221, subd. 4 (actions which before 1857 would have been equitable).

either under the usages of equity, or under the words of the statute, the bar is reckoned, not from the commission of the fraud, but from its discovery by the party defrauded.³⁷⁶ This bar of actions for relief against fraud has been also applied to suits by a creditor to set aside a fraudulent conveyance of his debtor's lands, though there has been a persistent and plausible effort to treat the fraudulent grantee as a continuing trustee for his grantor; which he is held to be under many collusive conveyances. The bar was applied in Kentucky in cases even where the conveyance was not only fraudulent, but even feigned; as the debtor remained in full possession.³⁷⁷ The better opinion, supported by decisions in the United States courts, in Tennessee, in California, and in South Carolina, will not allow the statute to run in favor of the fraudulent grant unless the

³⁷⁶ See Story, Eq. Jur. § 1521a. In New York, suits to set aside judgments, other than for money, for fraud, and to establish a will supposed to be suppressed, are brought in six years from the discovery of the fraud, or of the facts on which the validity of the will depends. Code Civ. Proc. § 382, subds. 5, 6; Gates v. Andrews, 37 N. Y. 657; Erickson v. Quinn, 47 N. Y. 410. In Kentucky, 5 years from the discovery of the fraud, but no more than 10 years from its commission. Here a creditor need not take notice of the recording of a fraudulent conveyance, Ward v. Thomas, 81 Ky. 452; though it is a strong circumstance, Fritschler v. Koehler, 83 Ky. 78; need not know it is fraudulent, Harrell v. Kea, 37 S. C. 369, 16 S. E. 42. In the Dakotas, in suits for fraud heretofore cognizable in chancery, six years from the discovery. Terr. Code Civ. Proc. § 54. In Mississippi (sections 2731, 2763), action for fraud accrues when it is, or should have been, discovered. In Iowa (section 2530), limitation runs from discovery of fraud. It would have been so without this declaration. Findley v. Stewart, 46 Iowa, 655. Wisconsin, § 4222; fraud cognizable before 1857 in equity, six years from discovery. In Indiana, time runs from discovery, where the cause of action has been purposely concealed. Silence alone does not stop its running. Rev. St. § 300, Churchman v. City of Indianapolis, 110 Ind. 268, 11 N. E. 301; Wynne v. Cornelison, 52 Ind. 313. In Pennsylvania the five-years statute counts from discovery of fraud. See Ferris v. Henderson, 12 Pa. St. 49; Piper v. Hoard, 107 N. Y. 67, 13 N. E. 632 (time runs against weak-minded person when he discovers that he has been deceived). In Iowa a recorded deed is notice to all the world. Bishop v. Knowles, 53 Iowa, 268, 5 N. W. 139; Gebhard v. Sattler, 40 Iowa, 152. Cases of mistake, counting from discovery, are Manatt v. Starr, 72 Iowa, 677, 34 N. W. 784; Duvall v. Simpson, 53 Kan. 291, 36 Pac. 330 (from discovery, or when, by reasonable diligence, it could have been discovered).

³⁷⁷ Phillips v. Shipp, 81 Ky. 436 (creditor's bill); Dorsey v. Phillips, 84 Ky. 420, 1 S. W. 667 (execution); Brown v. Connell, 85 Ky. 403, 3 S. W. 794.

grantee is in adverse possession, and then the limitation runs only from the time at which the creditor or purchaser at execution has otherwise the right to sue for sale or possession.³⁷⁸ In Virginia and West Virginia, the limitation on a creditor's suit for setting aside a fraudulent conveyance is barred only by the law limiting the judgment lien to ten years, by whatever process it is to be enforced. But where a conveyance is voluntary, and can under the statute be set aside on that ground alone at the suit of and for the benefit of antecedent creditors, the donee is given a short limitation of five years, counting from the day when the deed of gift is made. While in a few reported cases the five-years bar has been applied, it has oftener been refused, because the deed was tainted with actual fraud, or the time was extended, because the deed was withheld from record, and its concealment was deemed an "obstruction" to the creditor's action, within the meaning of another section of the law.³⁷⁹ Where no time is named for actions to set aside conveyances and judgments, or to rescind contracts, which affect land, for fraud, accident, or mistake (though there be a clause barring actions not otherwise provided for), courts of equity have mainly in such suits used a very wide discretion as to the measure of laches, regarding not only the analogies of the statute, but considering also the bearings of each case, the complainant's means of learning his rights on the one side, the efforts at concealment on the other, and, above all, whether the delay has so changed the condition of things

³⁷⁸ *Ramsey v. Quillen*, 5 Lea (Tenn.) 184 (only when grantee is in adverse possession); *Martin v. Smith*, 1 Dill. 85, Fed. Cas. No. 9,164 (debtor in possession); *McGee v. Jones*, 34 S. C. 147, 13 S. E. 326; *Amaker v. New*, 33 S. C. 28, 11 S. E. 386; *Brown v. Campbell*, 100 Cal. 636, 35 Pac. 433; *Watkins v. Wilhoit* (Cal.) 35 Pac. 646 (bar runs from return of no property); *Jackson v. Plyler*, 38 S. C. 496, 17 S. E. 255 (mortgagee against prior fraudulent grantee); same principle, *Carson v. Fears*, 91 Ga. 482, 17 S. E. 342; *Gillespie v. Cooper*, 36 Neb. 775, 55 N. W. 302 (conveyance to one in secret trust, he to another at true owner's request, limitation runs from second transfer).

³⁷⁹ *McCue's Trustees v. Harris*, 86 Va. 687, 10 S. E. 981; *Bickle v. Christian*, 76 Va. 678 (in *Williams v. Blakey*, Id. 554, an attempt to plead this bar between original parties to a deed was defeated); *Snoddy v. Haskins*, 12 Grat. 363; *Hunter v. Hunter*, 10 W. Va. 321; *Himan v. Thorn*, 32 W. Va. 507, 9 S. E. 930; *Reynolds' Adm'r's v. Gawthrop's Heirs*, 37 W. Va. 3, 16 S. E. 364 (when deed withheld from discovery); *Stillman v. Haas*, 151 Pa. St. 52, 25 Atl. 72.

that they can no longer, without grave harm to some one, be put back to the status quo.³⁸⁰

Where the statute of limitation applies in terms, a court of equity cannot excuse a delay upon any ground of ignorance of fact or of law, or by reason of any disability not named in the statute, no matter how great the hardship may appear.³⁸¹ Suits to quiet the title, or to obtain or correct a deed, by persons who have been let into the possession under an equity, trust, or contract for a title, are not generally deemed subject to limitation. On the contrary, the length of possession strengthens the right of the possessor to the indicia of ownership, and may at last become a strong and conclusive proof of ownership in itself.³⁸² On similar grounds, a bill to enjoin a sale of land for taxes which had been paid a long time before can-

³⁸⁰ *Canton v. McGraw*, 67 Md. 583, 11 Atl. 287 (three years to set aside grant by weak-minded ancestor, 16 months after his death, not stale); *Berkey v. St. Paul Nat. Bank*, 54 Minn. 448, 56 N. W. 53 (seven years); *Stiger v. Bent*, 111 Ill. 328 (four years not too long for mortgagee to set aside fraudulent release by trustee); *Sheffield Land, I. & C. Co. v. Neill*, 87 Ala. 158, 6 South. 1 (12½ years too long for rescinding sale because first payment not made); *Carbine v. McCoy*, 85 Ga. 185, 11 S. E. 651 (two years after discovery of fraud); *Le Gendre v. Byrnes*, 44 N. J. Eq. 372, 14 Atl. 621 (six years to set aside deed gotten by fraud from ancestor not too late); *Hyde v. Redding*, 74 Cal. 493, 16 Pac. 380 (suit to set aside a judgment which annulled land certificates, time counts only from the issue of the new ones); *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 33 Fed. 440 (suit brought after 19 years, to annul a railroad lease, stale); *Johnston v. Standard Min. Co.*, 39 Fed. 304 (five years, to set aside a compromise, after price of land had gone up, too late); *Johnston v. Dunn* (N. J. Ch.) 29 Atl. 361 (mortgage and assignment; foreclosed and wound up; attack on both for fraud in the mortgage, five years thereafter, stale); *Cottrell v. Watkins*, 89 Va. 801, 17 S. E. 328 (2½ years, to set aside a sale fraudulently brought about under deed of trust, not laches); *Bates v. Gillett*, 132 Ill. 287, 24 N. E. 611 (laches); *Neppach v. Jones*, 20 Or. 491, 26 Pac. 569, 849 (the needless trouble caused to defendant by plaintiff's delay taken into consideration), relying mainly on the definition of "laches" in *Lindsay Petroleum Co. v. Hurd*, L. R. 5 P. C. 228.

³⁸¹ *Case of Brodericks' Will*, 21 Wall. 523; *Reid v. Board of Sup'r's*, 128 N. Y. 364, 28 N. E. 367; *Adams v. Guerard*, 29 Ga. 651; *McCarty v. Ball*, 82 Va. 872, 1 S. E. 189.

³⁸² *Ryder v. Loomis*, 161 Mass. 161, 36 N. E. 836 (though the deed had been refused long before); *Ruckman v. Cory*, 129 U. S. 387, 9 Sup. Ct. 316; *Newell v. Montgomery*, 129 Ill. 58, 21 N. E. 508; *Love v. Watkins*, 40 Cal. 547; and very many other cases.

not be deemed stale by reason of such length of time. It need not be filed till the wrong to the title or possession is threatened; and so in similar cases.³⁸³ There is, however, a line of cases in Indiana looking the other way; where a suit by a person in possession to quiet the title against an outstanding deed, or a suit for the specific performance of a parol contract, under which possession was taken and kept, was held to be barred in 15 years.³⁸⁴ In speaking of specific performance of contracts (written or parol), we must distinguish between two kinds of laches: First, in affirming or rescinding the contract when it is still in fieri, and when equity, with its high-sounding phrase that "time is not of the essence of the contract," is much more dilatory than the law; and, second, in enforcing the contract after it is fully agreed upon, and generally carried out in some of its parts. The former subject, where hours, or days, or, at most, weeks, are in question, does not belong here. The latter does. Aside from the unrestricted time which the vendee in possession may have, the time to sue on such contracts, when in writing, is always regulated by statute, at least, the suit at law for breach of contract is; and the suit in equity would, as the remedy is concurrent, be barred by the same bar as the suit upon the bond, or sealed instrument, or other written contract.³⁸⁵ In some states, however,

³⁸³ Farmer v. Daniel, 82 N. C. 152 (equity of one in possession not lost by lapse of time); Smith v. Montes, 11 Tex. 24; Pleasants v. Blodgett, 39 Neb. 741, 58 N. W. 423 (limitation runs at most from the time when the defendant sets up his claim); Meier v. Kelly, 22 Or. 136, 29 Pac. 265; Coffee v. Emigh, 15 Colo. 184, 25 Pac. 83; Richards v. Hatfield, 40 Neb. 879, 59 N. W. 777 (so, where a mistake in a deed was made in 1877, and discovered in 1884, but the defendant took possession in 1891, a suit to correct the deed, brought in 1892, was not too late. Lockwood v. White, 65 Vt. 466, 26 Atl. 639); Mallagh v. Mallagh (Cal.) 16 Pac. 535; Barroilhet v. Anspacher, 68 Cal. 121, 8 Pac. 804, McNinch v. Trego, 73 Pa. St. 52; Douglass v. Lucas, 63 Pa. St. 10 (purchaser in possession by parol agreement). In Kentucky a vendee in possession is exempted from the statute. By analogy, suit to break a forged will need not be brought till it is probated, or about to be. Richardson v. Green, 9 C. C. A. 565, 61 Fed. 423.

³⁸⁴ Martin v. Martin, 118 Ind. 227, 20 N. E. 763; Royse v. Turnbaugh, 117 Ind. 539, 20 N. E. 485; Caress v. Foster, 62 Ind. 145; Murphy v. Blair, 12 Ind. 184.

³⁸⁵ So in New York, if the contract is sealed, the limitation is 20 years (Code Civ. Proc. § 381); if unsealed, only six. Plet v. Willson, 134 N. Y. 139, 31 N. E. 336.

the statute of limitation takes notice of the suit for specific performance by name. Thus, in Pennsylvania, it gives five years, without saving or exception; in Texas, ten years, subject to exceptions and disabilities as in personal actions; in California and other mining states, four years; in Minnesota, six years.³⁸⁶ The party entitled to a conveyance upon the payment or tender of a sum of money cannot wantonly delay such tender, and thus put off indefinitely the time within which he may sue for specific performance; but the bar is counted from the day when the payment or tender, under the agreement, could and should have been made.³⁸⁷

§ 189. Foreclosure and Redemption.

The enforcement of mortgages and of liens by express contract, and the redemption of land of which possession has been taken under a mortgage, must still be mentioned.

A few states have enacted laws expressly naming the time within which mortgages and "deeds of trust"—meaning mortgages with power of sale—may be enforced. It is in Virginia, not only on these instruments, 20 years, but there is no bar of time for the mortgage of a corporation. In North Carolina, on mortgages and deeds of trust 10 years after forfeiture, or after the last payment of interest, when the mortgagor is in possession. In South Carolina, it is 20 years, independently of the time within which the debt secured by mortgage may be barred. In Illinois, 10 years are given in which to sue, or to sell under a power without suit. In Michigan, the time is 15 years from the time when the debt becomes due, or when the last interest is paid. In Minnesota, 10 years are given to sue, but 15 in which to advertise and sell under a power. In Nebraska, the ordinary bar of actions for the recovery of land is extended to suits for the enforcement of mortgages; it is 10 years.³⁸⁸

³⁸⁶ Pennsylvania, Purd. Dig. "Limitations," 14; Texas, Rev. St. art. 3203; see, as to California, Luco v. Toro (Cal.) 18 Pac. 866 (either an action on written contract, or one not otherwise named); Minnesota, c. 66, § 6.

³⁸⁷ Lewis v. Prendergast, 39 Minn. 301, 39 N. W. 802. The court refers, for a full citation of authorities, to 3 Pom. Eq. Jur. § 1407. Nor can the time for negotiation or calculation be added. Short v. Van Dyke, 50 Minn. 286, 52 N. W. 643. In Peters v. Delaplaine, 49 N. Y. 363, it is held that 10 years is the limitation in New York.

³⁸⁸ Virginia, Code, § 2935; Gibson v. Green's Adm'r, 89 Va. 524, 16 S. E. (1450).

In several of the other states, in the absence of such a law, the courts have held that the time for enforcing a mortgage or other lien depends altogether on the nature of the obligation which it is made to secure; a doctrine which has this grave shortcoming: that a mortgage or lien often exists without anybody being, or ever having been, liable for the amount charged upon the land. Thus, if the obligation be a sealed bond, or a covenant of payment in the deed, the limitation would be much longer,—say 20 years,—where an unsealed note or bill of exchange is barred in 6 years. The distinction is not of much importance in the Western and Southern states, in which the limitation on unsealed notes is generally the same as on bonds; in fact, in many of them (beginning with Kentucky in 1812) the use of private seals to contracts is wholly dispensed with. We find rulings to the above effect in Iowa, Kentucky, Kansas, California, Alabama, in Ohio, and, in somewhat modified form, in Mississippi.⁸⁸⁹ In New York, it seems, the mortgage

661 (though judgment on the bond barred, deed of trust good); *Brown v. Butler*, 87 Va. 621, 13 S. E. 71 (mortgagor's absence from the state, or sale of the land, not an obstruction); North Carolina, Code, § 152; South Carolina, Code Civ. Proc. § 111; Illinois, Rev. St. c. 83, § 11; Michigan, § 8709; Minnesota, c. 66, § 11; Nebraska, § 4542; Washington, Code Proc. § 120; *Parker v. Dacres*, 2 Wash. T. 439, 7 Pac. 893. See *Jenkins v. Wilkinson*, 113 N. C. 532, 18 S. E. 696 (though debt barred). The possession of the mortgagor or his grantee is adverse only after default, *Woody v. Jones*, 113 N. C. 253, 18 S. E. 205; that of mortgagor's grantee from the time he takes it, *Boutwell v. Steiner*, 84 Ala. 307, 4 South. 184. The mortgage is not barred with the debt. *Jenkins v. Wilkinson*, 113 N. C. 532, 18 S. E. 696; *Overman v. Jackson*, 104 N. C. 4, 10 S. E. 87. The possession is not adverse till after maturity of last installment. *Parker v. Banks*, 79 N. C. 480. See, also, the very peculiar case of *Arthur v. Screven*, 39 S. C. 78, 17 S. E. 640.

⁸⁸⁹ *Smith v. Foster*, 44 Iowa, 442; *Prewitt v. Wortham*, 79 Ky. 287; *Hitt v. Pickett's Adm'r*, 91 Ky. 644, 11 S. W. 9 (where the legal title was retained for security); *Heinlin v. Castro*, 22 Cal. 100; *Lord v. Morris*, 18 Cal. 482; *Ohmer v. Boyer*, 89 Ala. 273, 7 South. 663 (was barred in 20 years; bar in ejectment only 10); *Crooker v. Pearson*, 41 Kan. 410, 21 Pac. 270; *Kulp v. Kulp*, 50 Kan. 341, 32 Pac. 1118, and *McCarthy v. White*, 21 Cal. 498 (note payable under foreign laws, mortgage follows its limitation); *Fuller v. Oneal*, 82 Tex. 417, 18 S. W. 479, 481 (trustee cannot sell under power when debt barred); *Bell v. Clark*, 71 Miss. 603, 14 South. 318 (mortgage by wife on her land for the joint debt of husband and wife, barred as against her, but still alive against husband's estate, remains in force); *Yearly v. Long*, 40 Ohio

itself, being a sealed instrument, is looked to, and may be enforced on that ground within 20 years, not on the ground of any analogy to the action of ejectment.³⁹⁰ In Maine and Massachusetts, where bonds are not within the statute of limitations, but lie only under the presumption of payment after a lapse of 20 years without recognition, such a presumption may, in proceedings upon the mortgage, be rebutted by proof; and thus a mortgage may be enforced though more than 20 years have elapsed since its maturity, or since the last payment of interest.³⁹¹ It was held in these states (and probably is the law in the other New England states) that, when the note secured by the mortgage is barred by a shorter period than 20 years, the lien of the mortgage is not affected thereby; for the mortgagee should not be in a worse plight by having an unsealed note than if he had none.³⁹² In Maryland, a mortgage or a vendor's lien is barred only by presumption of payment after the lapse of 20 years. It does not appear that the presumption can be rebutted. On the other hand, it is not shortened by reason of a note or bill, which runs out in a shorter time, being given for the debt.³⁹³ New Jersey and the Dakotas have taken as strong a ground in favor of the mortgagee; for his security on the land is respected, though the bond is

St. 27 (vendor's lien). See, also, *Reynolds v. White*, 94 Ky. 156, 21 S. W. 754. In Missouri, an act of February 18, 1891 (page 184, Sess. Acts), recognizes the rule, and directs that no deed of trust or mortgage executed thereafter shall be enforced by sale in pais or by suit after the debt is barred. Arkansas has by Act March 29, 1889, limited actions on all sealed instruments to five years.

³⁹⁰ *Hauselt v. Patterson*, 124 N. Y. 349, 26 N. E. 937 (against heirs and devisees, 20 years from last payment of interest); *Scott v. Stebbins*, 91 N. Y. 605 (lien of legacy on land, 10 years). Vendor's lien six years, though the deed of the land is under seal, *Coleman v. Second Ave. R. Co.*, 38 N. Y. 201.

³⁹¹ *Knight v. McKinney*, 84 Me. 107, 24 Atl. 744, relying on *Story, Eq. Jur.* § 1157, and supported by *Central Bank of Troy v. Heydorn*, 48 N. Y. 260, no longer applicable in New York; *Bunker v. Barron*, 79 Me. 62, 8 Atl. 253 (payment only can discharge); *Kellogg v. Dickinson*, 147 Mass. 432, 18 N. E. 223 (barred by presumption); *Andrews v. Sparhawk*, 13 Pick. 393 (may be rebutted).

³⁹² *Thayer v. Mann*, 19 Pick. 535; *Adams v. Brackett*, 5 Metc. (Mass.) 280.

³⁹³ *Moreton v. Harrison*, 1 Bland, 491; *Lingan v. Henderson*, Id. 236, 281. (1452)

admitted to be barred by time. Nothing can defeat the mortgage but the payment or the adverse possession for the statutory time of a party who disavows it.³⁹⁴ In California and the mining states which have copied its limitation laws, the ordinary bar of the mortgage is four years from its maturity, which, by the death of the mortgagor, may be extended for one year after such death.³⁹⁵ In Tennessee, an action on the mortgage is barred in ten years from maturity, as one "not otherwise provided for." The lien may, after the debtor's death, be enforced against the land, though the claim against the decedent's estate have been barred by seven years from death; and this is so in Alabama and Kansas.³⁹⁶ Where, however, a mortgage on one person's land is given to secure the debt of another, it falls to the ground whenever that debt is extinguished, whether by payment, by lapse of time, or by presumption (not, however, by bankruptcy; for to provide against that may have been the main object in taking the security). Even when the mortgage contains a covenant of payment by the grantor, a court may inquire into its consideration, and if there was none, no forbearance being given at the time to the principal debtor, such covenant will not be allowed to lengthen the period for which the land remains a security for the debt.³⁹⁷

A bond and mortgage may, as between the parties, be kept alive by yearly payments of interest, or by part payments on the principal. In this way a lien on land, which, to all appearances, is removed by the bar of time, is kept up, to the injury of innocent purchasers. It would seem that, in those states in which the mortgage falls to the ground whenever the debt is barred, it ought not to be enforced, against purchasers in good faith, beyond the lawful number of years

³⁹⁴ Wanmaker v. Van Buskirk, 1 N. J. Eq. 685; Barned v. Barned, 21 N. J. Eq. 245. And such is the statute in the Dakotas, Civ. Code, § 1717.

³⁹⁵ California, Code Civ. Proc. §§ 337, 353; McMillan v. Hayward, 91 Cal. 357, 29 Pac. 774.

³⁹⁶ Smith v. Goodlett, 92 Tenn. 230, 21 S. W. 106; Smith v. Gillam, 80 Ala. 297; Phelps v. Murray, 2 Coop. Ch. 746 (mortgage not barred with debt). And so in Kansas. Andrews v. Morse, 51 Kan. 30, 32 Pac. 640 (the three-years limitation of claims against decedents does not bar mortgage).

³⁹⁷ Crawford v. Hazelrigg, 117 Ind. 64, 18 N. E. 603; Bridges v. Blake, 106 Ind. 332, 6 N. E. 833; Sage v. Strong, 40 Wis. 575; Boschert v. Brown, 72 Pa. St. 372.

from its maturity, by such payments, or by any acknowledgments, not brought to such purchaser's notice. But here, again, the courts disagree.³⁹⁸

Where the owner of land sells it on credit, without giving a conveyance at the time, but it is understood that he will convey upon payment of the price, he cannot be compelled to part with the legal title till he is actually paid; and that the notes for the purchase money are barred, is immaterial.³⁹⁹ And the same doctrine has, in some of the Southern states, been enforced where the seller, according to the local custom, gave a deed of conveyance at the time of sale, reserving therein an express lien to secure the purchase notes.⁴⁰⁰

The plea of limitation is available, not only to the mortgagor and his heirs, but also to "terre-tenants" and to second incumbrancers, though it must be conceded that on the last point the authorities are not fully agreed. One who buys, or takes a mortgage in express words subject to an elder mortgage, may be estopped from denying the sum then due, but he is not estopped from showing that it has been since discharged. Yet the old disfavor to the statute of limitations—the notion that it gives an optional defense, which a fair-minded man would waive—pervades some of the opinions on the subject.⁴⁰¹

³⁹⁸ Tate v. Hawkins, 81 Ky. 577. Contra, Plant v. Shryock, 62 Miss. 821 (which makes it incumbent on the examiner of a title to look into mortgages beyond the period of limitation), and Bowmar v. Peine, 64 Miss. 99, 8 South. 166. See, as to renewal of lien notes, Moran v. Wheeler (Tex. Civ. App.) 26 S. W. 297. In Arkansas, by an act of March 29, 1889 (section 4828 in new Dig. St. 1894), a part payment on the mortgage debt does not affect the rights of third parties, unless an entry of the fact is made on the margin of the record. In South Carolina, on the contrary, the statutes provide for putting on record a part payment or acknowledgment, and this extends the time for 20 years from its entry.

³⁹⁹ Hanna v. Wilson, 3 Grat. 232; Phelan v. Fitzpatrick, 84 Wis. 240, 54 N. W. 614.

⁴⁰⁰ Evans v. Johnson, 39 W. Va. 299, 19 S. E. 623. See Virginia statute cited in note 388; Tunstall's Adm'r v. Withers, 86 Va. 892, 11 S. E. 565. Owelty under decree of partition good for 20 years. McKibben v. Salines (S. C.) 19 S. E. 302. The implied or equitable vendor's lien may be lost.

⁴⁰¹ Hill v. Hilliard, 103 N. C. 34, 9 S. E. 639 (purchaser or second mortgagee may plead). To the same effect are many of the cases quoted generally in former notes. In Lee v. Feamster, 21 W. Va. 108, the defense of

The right to foreclose (or to sue for a decree of sale) and the right to redeem are said to be reciprocal, and thus the latter is barred after the same lapse of time from possession taken after default in which the enforcement of the security is barred, counting from the "breach of condition"; that is, from the falling due of the debt.⁴⁰² It would, however, seem harsh that, while a mortgage given to secure a bond may be redeemed within 20 years after default and possession taken, another mortgage, securing a bill of exchange, should be only redeemable for 6 years; and the old English rule, allowing 20 years, in analogy to the bar in ejectment, or such other length of time as the law gives for an ejectment (or for an equitable land suit, or unnamed suit, as in New York) seems more reasonable,—counting only the time while the mortgagee is in possession after default.⁴⁰³ But where he enters under special agreement for a term, with an understanding that he is to apply the rents and profits to the extinction, there disallowed to judgment creditors, is compared to that of limitations, both being personal, and should not be forced on a living man, as it might hurt his standing in the community to rely on either defense. The case of a purchaser is rather less favorable than that of an incumbrancer. If I buy a house worth \$10,000 for \$5,000 by reason of an old \$5,000 mortgage on it, still alive, but which will expire by limitation next year, and the holder of the mortgage fails to enforce it, it seems more natural that his debtor should profit from his laches than that I should. However, in those states in which the bar of the mortgage rests on adverse possession, my possession must be tacked to that of the mortgagor, if his had been such before the transfer. A recognition of that mortgage in the deed would, however, break the "hostility" of the possession, and the previous time would not count.

⁴⁰² *Borden v. Clow*, 21 Nev. 275, 30 Pac. 821; *Cunningham v. Hawkins*, 24 Cal. 403; *Espinosa v. Gregory*, 40 Cal. 58; *Montgomery v. Noyes*, 73 Tex. 203, 11 S. W. 138.

⁴⁰³ Such is the old English rule as given by Kent and Story. *Bunce v. Wolcott*, 2 Conn. 27. Such is the California Code Civ. Proc. § 346, giving only five years; Idaho, § 4062, the same; also the statute in New Jersey, "Limitation," 18, enforced in *Bates v. Conrow*, 11 N. J. Eq. 137). In New York, under Code Civ. Proc. § 379, there is adverse possession after breach of condition or nonfulfillment of covenant. Before the present Code, redemption was barred in 10 years. *Hubbell v. Sibley*, 50 N. Y. 478; *Miner v. Beekman*, 50 N. Y. 337 (20 years only for actions at law). It is 10 years in Mississippi (Code, § 2732), like bar in ejectment. The mortgagee can, of course, shorten the time by suing for foreclosure. *Frink v. LeRoy*, 49 Cal. 315, goes on "reciprocal ground," barring redemption for that state in four years. See, also, *Cunningham v. Hawkins*, 24 Cal. 409.

tion of the debt, his possession is, while such agreement is carried out, not adverse to the right to redeem, and time does not run while the agreement is acted on.⁴⁰⁴

The very short terms prescribed by the laws of Maine, Massachusetts, Rhode Island, and New Hampshire (three years, or even one) are not really times of limitation, or measures of staleness in the claim to redeem, but part of a system of strict foreclosure, and have been referred to as such in a former chapter. Unless possession has been obtained by the mortgagee with the solemnities prescribed (in New Hampshire, only by writ of entry), these short terms do not apply; and the mortgagor has, as under the old English practice there, 20 years in which to redeem in analogy to the bar in ejectment, or of a writ of entry.⁴⁰⁵

A distinction is taken between a suit to redeem, in which the mortgagor still admits himself in debt and the mortgage as subsisting, and a suit to cancel that instrument because it is paid off. When the debt is paid only out of rents and profits, or by the sale of parcels, the line is hard to trace. If the court deems the mortgagee bound to give an account, the suit to cancel would lie only at the time when the mortgage is fully paid off, and the limitation would only then begin to run,—to the great advantage of the mortgagor.⁴⁰⁶

The limitation of a suit to turn an absolute deed into a mortgage, with a view to redemption, might, under the doctrine of laches, be shorter than that of an ordinary suit to redeem. It cannot, on any ground, be longer.⁴⁰⁷ As long as the mortgagor is in possession, the

⁴⁰⁴ As to what makes mortgagee's possession adverse, see *Rung v. Shoenberger*, 2 Watts, 23 (puts improvements up, treats land as his own for 21 years); *McMasters v. Bell*, 2 Ben. & W. 183.

⁴⁰⁵ *Daniels v. Mowry*, 1 R. I. 151.

⁴⁰⁶ *Green v. Turner*, 38 Iowa, 112, 119; *Newman v. De Lorimer*, 19 Iowa, 244; *Grattan v. Wiggins*, 23 Cal. 16, 35. In California it was so held in *Hughes v. Davis*, 40 Cal. 117, the facts arising before the Code of Civil Procedure; the debt under the law of New York expiring in six years, and the defendant's absence being no excuse.

⁴⁰⁷ *Frisbee v. Frisbee*, 86 Me. 444, 29 Atl. 1115; *McPherson v. Hayward*, 81 Me. 329, 17 Atl. 164 (even the 20-years possession must be clearly adverse), quoting Story, Eq. Jur. § 1157. Analogous is *Green v. Turner*, 38 Iowa, 112, where the term is 10 years. The mortgagee's possession may be adverse in states which do not allow him to take possession under his mortgage, as in Nevada. *Borden v. Clow*, 21 Nev. 275, 30 Pac. 821.

lapse of time will not bar his suit to redeem, nor his suit to have the outstanding mortgage canceled or released of record, upon the ground that it is fully paid.⁴⁰⁸ On the contrary, the mere lapse of time may furnish him the presumption that the mortgage has been paid.⁴⁰⁹

If the mortgagor was in possession at the time when the security is given, one who obtains the possession of the land from him thereafter, whether lawfully or unlawfully, is not presumed to hold adversely to the mortgagee, as it is not usual for the latter to take possession, though, it seems, he may so act as to render his holding adverse, and thus to bar the mortgage in due time.⁴¹⁰

⁴⁰⁸ O'Connor v. Smith, 40 Ohio St. 214; Miller v. Smith, 44 Minn. 127, 46 N. W. 324. See section on "Absolute Deed," etc., in former chapter (delay in offer to redeem, evidence that there was a sale); Meehan v. Blodgett, 86 Wis. 511, 57 N. W. 291 (suit to set aside irregular foreclosure; large advance in price; two years fatal); Railway Co. v. James, 54 Ark. 81, 15 S. W. 15 (no excuse for delay). Contra, Caress v. Foster, 62 Ind. 145 (time to redeem the same as of mortgage in form).

⁴⁰⁹ Quinn v. Kellogg, 4 Colo. App. 157, 35 Pac. 49.

⁴¹⁰ Duke v. State, 56 Ark. 485, 20 S. W. 600.

CONCLUDING REMARKS.

Among the defects in the American law of land titles, as sketched in the two volumes now brought to a close, the first and most apparent is the great diversity between state and state, not only in the broader features: in those principles which are shaped by popular feeling on questions of policy, such as the position of the wife in the family, the power of married women over their own property, the rights of creditors, the protection of the debtor, but even in the most insignificant details: such questions as whether a will may be signed in the middle, or must be subscribed at the end; whether a power to sell includes a power to mortgage; whether, in a given case, the wrongful possessors of land can or cannot "tack" the length of time of their respective possessions. It is true, the land in each state is governed by its own laws, and the lawyers and judges might ignore the laws in force across the nearest state line; but the United States have become so thoroughly one country and one people, the contracts and wills governing land in one state are so often written within another, and, what is even more important, the judges and lawyers who administer the land laws of one state have so often been educated in another, that the great diversity of land laws has become a very serious inconvenience. If, by pointing out this great diversity in these two volumes, the author has in any measure directed the attention of the lawyers and lawmakers of the several states towards a concerted effort for bringing the state laws into greater harmony, his labor upon this treatise will not have been bestowed in vain.

The other great defect which the author finds in American law is its great uncertainty. In his opinion, already expressed in the body of the work, and which he shares with Chancellor Kent, the title to land should not be transferred or incumbered by anything but matter of public record. In his opinion, more, in the long run, is lost than gained by the enforcement of "equities." In countries in which the title of real estate rests on the public record alone, litigation for land is almost unknown; and every buyer of land examines the title for himself, with no more trouble or expense than he

would incur when buying a block of railroad shares. The complicated Anglo-American land law has had only one beneficial result: it has given to England and to the United States a race of learned and thoughtful judges and lawyers.

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